**Republic v Kenya Ports Authority; Container Freight Stations Association of Kenya (Ex parte) (Application E023 of 2025) [2025] KEHC 18994 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18994 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**APPLICATION E023 OF 2025**

**J NGAAH, J**

**DECEMBER 19, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**AND**

**CONTAINER FREIGHT STATIONS ASSOCIATION OF KENYA ..... EX PARTE**

## JUDGMENT

1. The motion before court seeks judicial review reliefs of certiorari, mandamus, and prohibition. The applicant also seeks a declaration. The prayers for these reliefs have been couched as follows:

> " Certiorari
>
> (i) That an order of Certiorari be and is hereby issued to remove into this Honourable Court for purposes of being quashed, the decision of the Respondent contained in the Kenya Ports Authority Tariff Book 2025, in particular:
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> (ii) Clause 15.5, which accords preferential tariff treatment to Inland Container Depots (ICDs) while excluding Container Freight Stations (CFSs);
>
> (iii) The imposition of "shore-handling charges" on CFS-bound cargo;
>
> (iv) The revised stevedoring and wharfage rates; and
>
> (v) The introduction of the "Dirty Cargo Surcharge" of USD 0.50 per metric tonne.

Prohibition: -

(i) That an order of Prohibition be issued restraining the Respondent, its servants, agents, or assigns from implementing, enforcing, or giving effect to the impugned provisions of the Tariff Book 2025, including:

(ii) Preferential treatment of ICDs over CFSs in storage and handling charges;

(iii) Enforcement or collection of shore-handling charges on cargo destined for or handled at CFSs;

(iv) Enforcement of discriminatory free storage periods;

(v) Implementation of the revised stevedoring and wharfage rates; and

(vi) Implementation of the "Dirty Cargo Surcharge."

Mandamus: -

That an order of Mandamus be issued compelling the Respondent:

(i) To undertake meaningful stakeholder consultation, impact assessment, and cost-benefit analysis before introducing or revising tariffs;

(ii) To establish non-discriminatory tariff structures that ensure equal treatment of CFSs and ICDs as recognized customs areas under law;

(iii) To align tariff structures with regional benchmarks to safeguard the Port of Mombasa's competitiveness as a regional trade hub.

Declaration (alternative/additional relief):

a) That this Honourable Court be pleased to declare that the impugned tariff provisions are unconstitutional, unlawful, discriminatory, and procedurally unfair for failure to comply with Articles 10, 27, 47, and 232 of *the Constitution* and the *Fair Administrative Action Act*."

The applicant has also asked for costs of the suit.

2. The application is based on a statutory statement dated 1 September 2025 and an affidavit sworn by Daniel Nzeki verifying the facts relied upon. Nzeki has sworn that he is the chief executive officer of the applicant which is described in the statement as a duly registered association under the *Societies Act*, cap. 108. The association comprises members who are licensed operators of Container Freight Stations (CFS) and what the applicant describes as "Transit Shade" within Kenya. Its members are said to collectively provide critical logistical support in the clearance, storage, and transportation of cargo to and from the port of Mombasa.

3. Accordingly, the association's mandate includes engaging with regulatory and statutory bodies such as the Kenya Ports Authority (KPA), the Kenya Revenue Authority (KRA), and other relevant agencies in the logistics and transport sector to ensure fair competition, transparency, and adherence to the law. It is against this background that the association has initiated this suit on behalf of its members who are affected by what is called "the KPA Tariff Book 2025".

4. According to the applicant, on or about July 2025, the Respondent published the KPA Reviewed Tariff Book 2025, introducing, inter alia, Clause 15.5 and shore-handling charges applicable to CFS cargo. These changes are alleged to be couched in a manner that places undue advantage in favour of

the government owned Inland Container Depot (ICD) over the privately-owned Container Freight Stations yet the two are basically in the same business where they act as "extensions" of the Port.

5. The applicant is said to have objected to the introduction of the tariff book. The applicant's objection was communicated through a letter dated 26 February 2025 in which the applicant raised the following grounds of objection:

> " a) The rising operational costs cited by the Respondent are already cushioned by the appreciation of the US Dollar against the Kenya Shilling over the relevant period.
>
> b) CFSs, like ICDs, are of national strategic importance and play a critical role as buffer capacity to enhance port throughput, and therefore should be treated on parity.
>
> c) Tax evasion and revenue leakages are more prevalent at the port and ICDs due to relaxed interventions, while CFSs subject all cargo to scanning and verification, thus better serving the public interest."

6. The association recommended that Clause 15.5 of the tariff book be amended to extend the 70% concession to CFSs alongside ICDs. Notwithstanding the objections, Respondent is alleged to have ignored the applicant and published the impugned Tariff Book 2025 without extending the concessions to the CFS.

7. According to Nzeki, the Applicant and its members are directly affected by the Respondent's impugned decision, hence their quest for the intervention by this Honourable Court. In particular, it is alleged that the new tariff book introduces additional costs and distortions which will, inevitably, be passed on to importers, exporters, and ultimately consumers. This will in turn lead to higher commodity prices, reduced competitiveness of Kenyan trade, and inefficiencies in the logistics chain contrary to the national interest and the Government's stated objectives on trade facilitation and the ease of doing business agenda.

8. The applicant's case is that under Article 10 of *the Constitution* and Section 4(3) of the *Fair Administrative Action Act*, No. 4 of 2015, the Respondent was under a legal obligation to conduct meaningful public participation, consider stakeholder input in good faith, and provide written reasons for its decision. The Respondent is claimed to have failed to discharge these duties, thereby violating principles of transparency, accountability, and fair administrative action.

9. The respondent, it is sworn, being a public body established under the *Kenya Ports Authority Act*, cap. 391 and discharging statutory functions, is bound by the provisions of Article 10 and Article 47 of *the Constitution*, as well as Section 4 of the *Fair Administrative Action Act*, which require that all administrative decisions be lawful, reasonable, procedurally fair, and preceded by meaningful public participation. With respect to revising its tariff structure, the Respondent was under a duty to provide adequate notice of the proposed changes, to circulate draft proposals, to engage in genuine stakeholder consultation, and to provide written reasons demonstrating how stakeholder feedback was considered.

10. The respondent opposed the application and filed a replying affidavit to that effect. The affidavit was sworn by Geoffrey Kavate, who has introduced himself as the General Manager Finance and Commercial Services at Kenya Ports Authority.

11. According to Kavate, the Ports and facilities under the mandate of KPA include the Ports of Mombasa, Lamu, Kisumu, Kilifi, Malindi, Mtwapa and Shimoni, as well as the Inland Container Depots in

Nairobi, Naivasha and Kisumu. The Inland Container Depot in Nairobi which is an Inland Port is particularly referred to as an extension of the Port of Mombasa, and the two are connected via railway.

12. The concept of Gazettement of privately-owned CFSs by Kenya Revenue Authority as Customs Areas was adopted sometime in 2012 as a temporary measure to ease the congestion that was experienced in the Port of Mombasa in that year. The arrangement eased the burden from Kenya Ports Authority of having to warehouse cargo for long periods as customs clearance under the purview of the Kenya Revenue Authority proceeded. In that regard, long stay containers were transmitted to a duly gazetted CFS where the Customs procedures culminating in the clearance of the cargo would be done.

13. When rendering the storage and loading services, the CFSs set and levy their own charges independent of the charges levied by KPA for the services it renders. The rates for CFS services are entirely the decision of the private CFS operators and are not in any way imposed or collected KPA.

14. All facilities that store and handle export or import cargo must first be gazetted as Customs Areas for purposes of the East African Community Customs Management Act, 2004 (EACCMA), and pursuant to that, such facilities and the cargo are all subject to customs control. This requirement applies to the Respondent's ICDs and the privately owned CFSs.

15. The applicant’s case, according to the respondent, is based on a misunderstanding of the purpose of such gazettement, that it ostensibly confers similar status for purposes of the scope of services they offer or charges they raise. Contrary to the applicant’s position, the KPA owned Ports, ICDs and inland Ports are Customs Areas only for purposes of customs administration in respect of cargo imported or exported through the facilities. However, their primary purpose as expressly stated in the KPA Act is to render statutory services to the public.

16. KPA's statutory mandate to set its Tariff is based only on the statutory services it renders and not on the fact that its facilities are Customs Areas. Thus, the argument by the Applicant purporting to fault the KPA Tariff 2025 on the basis of comparison of regional ports and within KPA facilities as Customs Areas is not sustainable. In any case, KPA does not have a statutory mandate to set the Tariff for any other Customs Area other than those under its mandate.

17. In exercise of this authority, the Respondent undertook the task of reviewing the Tariff Book of 2012, and to prepare a new Tariff Book to replace it. The respondent also involved stakeholders in the region in the Tariff Review process by formally inviting them to stakeholder engagements to present their comments and feedback. The notice for these engagements was published in the mainstream media of national circulation on 24 January 2025.

18. Following the publication of the notice, the Respondent convened consultative forums with stakeholders in Mombasa, Nairobi, Kampala and Kigali in the month of February 2025.The Respondent received submissions of written comments and recommendations from various stakeholders including the Applicant.

19. Having conducted the public and stakeholder engagements, the Respondent considered all the feedback it received, conducted a final regulatory impact analysis and prepared the 2025 Tariff Book taking into account the comments and feedback received.

20. The Respondent presented the final draft of the 2025 Tariff Book to the KPA Board of Directors for review and adoption. In conformity with the Act, the Respondent presented the proposed 2025 Tariff Book to the Cabinet Secretary for Roads and Transport for approval and concurrence with the National Treasury.

21. The Cabinet Secretaries duly approved the 2025 Tariff Book paving the way for the KPA to publish it pursuant to the powers granted to it in the Act.

22. The Act grants the Respondent discretion to prescribe rates and charges attendant to the facilities and operations in the ports it manages. In discharging this mandate, KPA takes various factors into consideration, key among them being the operational and business costs as well as the public benefits to KPA's clients who primarily are the shipping lines, shippers and consignees of import and export cargo.

23. The Respondent's 2025 Tariff Book prescribes few concessional rates to be enjoyed by consignees using the KPA Inland Container Depots (ICDs), particularly with regards to handling charges. This is especially in respect of the scope of services that were not previously offered in the ICDs, being the handling of general(conventional) cargo. Currently, the ICDs mainly handle containerized cargo, and thus concessional rates are necessary to attract clients to ship and clear conventional cargo through the ICDs.

24. All the rates and charges prescribed in the Tariff are only in respect to use of KPA facilities and the services rendered by KPA only. It does not in any way discriminate, nor does it prescribe or impose obligations on the Applicant and any other privately-owned facility. On the contrary, the Applicant is indeed at liberty to set similar or lower rates in comparison to those of KPA as a public entity. It is worth remembering however, that the services rendered by the parties in these proceedings are not done in competition, because the CFSs only offer complementary services to those rendered by KPA.

25. The respondent maintains that the concessional rates for the Respondent's ICDs are lawful, reasonable and in pursuance of a harmonised government policy to enhance KPA's capacity as well as to optimise the utilisation of critical infrastructure built and maintained by the Respondent using public funds. It is expected that the concessional rates will also improve the utilization of the Standard Gauge Railway for haulage of cargo from the Port of Mombasa to the ICDs in a manner that enhances value for money for importers and exporters.

26. According to the respondent, the 2025 Tariff does not set any conditions against CFSs. This is because the rates and conditions prescribed in the Tariff are in respect of the cargo handling and storage conditions and the charges raised by KPA to the cargo owners and not to the CFSs. Any concessional rate in the Tariff Book is to the benefit of cargo owners and the public. Neither do the rates create an obligation on the CFSs nor are the CFSs compelled to adopt them as their own rates for the services they render.

27. Contrary to the applicant’s allegations, the extension of preferential conditions and concessional rates to importers or exporters using the KPA-owned ICDs is not new and unique to the 2025 Tariff Book; the 2012 Tariff Book also afforded concessional free storage periods for its ICDs.

28. Also, the ICDs concessional rates are only as a comparison to the rates charged by KPA for the storage and handling of cargo at the KPA Sea Ports. KPA never prescribes rates to be charged by any of the privately-owned CFSs represented by the Applicant.

29. With respect to shore handling charges, KPA imposes this charge on cargo imported through the Port of Mombasa as prescribed in the Tariff Book. As the name suggests, the shorehandling charge is raised for the services including handling cargo to or from a vessel and at the quay, jetty or yards. It is therefore untrue to assert that this charge is raised for services not rendered.

30. It is only the cargo declared for clearance at the ICDs that enjoys a concessional rate, which is lawful, proper, reasonable and beneficial to the cargo importers or exporters and the public at large, contrary to the Applicant's assertions.

31. It has been sworn on behalf of the respondent that the Respondent's revised stevedoring and wharfage charges contained in the 2025 Tariff Book are lawful and reasonable and that they do not in any way affect the Applicant's scope of services and the charges that its members raise for the services they render.

32. The Respondent acted well within its powers to revise cargo handling or storage conditions and the attendant charges after conducting sufficient stakeholder engagement and consideration of feedback.

33. Parties' respective counsel made oral submissions and subsequently also filed written submissions in support of and in opposition to the application. I gather from the application that the respondent's decision is challenged on all the traditional grounds of judicial review of illegality, irrationality and procedural impropriety.

34. These grounds were explained by Lord Diplock in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

35. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

36. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave. And Order 53 Rule 4(1) of the Civil Procedure Rules states, also unambiguously, that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

37. In the applicant's statutory statement, the applicant has also stated "discrimination" and "violation of constitutional principles" as other grounds of upon which its application for juridical review reliefs is grounded. In my humble view, these "grounds" more or less, speak to the ground of illegality and they could be conveniently addressed as such, assuming, of course, there is any merit in the allegation that the respondent's impugned decision is tainted in these particular respects.

38. Bearing this legal background in mind, it is not in dispute that the under section 30 (1) of the *Kenya Ports Authority Act*, the respondent has the obligation to prepare a tariff book such as the one in contention in this suit. This section provides as follows:

> 30. Authority to prepare Tariff Book, etc.
>
> (1) The Authority shall cause to be prepared and published in such manner as it may think fit—
>
> (a) a Tariff Book containing all matters which under this Act are required to be contained therein together with such other matters as, under this Act, may be determined by the Authority and such other matters as the Authority may think fit;

39. According to section 30(2) the tariff book must be made available for public inspection at every port office.

40. It is also not in doubt that the information contained in the tariff book would include such information as relates to taxes or other charges levied by the respondent as prescribed by the Act. For instance, according to section 10 (a) of the Act, the respondent, through its Board of Directors established under section 4 of the Act, has the authority to alter any tariffs or other charges. This section reads as follows:

> 10. Powers of the Board
>
> In the exercise of its duty under section 8, and subject to any directions of a general nature which may be given to it by the Cabinet Secretary, the Board may—

a. approve any minor alteration in the tariffs, rates, fares and other charges;

41. As for major alterations in the tariffs, rates and other charges, section 11(b) provides that the cabinet secretary may in consultation with the cabinet secretary for Finance approve any major alterations on those levies. It reads as follows:

> 11. Powers of the Cabinet Secretary
>
> The Cabinet Secretary may—
>
> (b) in consultation with the Cabinet Secretary responsible for finance, approve any major alterations in the tariffs, rates, fares and other charges made for the services provided by the Authority;

41. Up to this point, it is clear that the respondent has the statutory obligation to prepare the tariff book and, therefore, the question of whether it could prepare the Tariff Book 2025 need not arise.

42. As for the concessions and charges complained of, they certainly fall under "tariffs, rates, fares and other charges" which may be altered by the Board with the blessings of the Cabinet Secretary or by the Cabinet secretary in consultation with the Cabinet Secretary for Finance.

43. Besides the question of public participation which I will come back to in due course, nowhere, in the pleadings or affidavit filed by the applicant has it been contended that any of the processes for alteration of the tariffs either under section 10 (a) or 11(b) of the Act has not complied with in the Tariff Book 2025.

44. One other important point to note is that the alteration of the tariffs either by the Board or by the Cabinet Secretary is discretionary.

45. Speaking of discretion to act in any particular manner in judicial review reliefs, the court in Chief Constable of the North Wales Police versus Evans (1982) 1 WLR 1155 (at 1160F) stated as follows:

> " The remedy by way of judicial review under RSC...is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ...administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner...and not to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law." (Per Lord Hailsham at 1160E-H)."

41. Similar observations were made by Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan BC [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064 where he noted:

> " The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

41. And to the specific question whether the order of mandamus can issue where a statute leaves it to the discretion of a public officer on the performance of any particular duty, HALSBURY'S LAW OF

ENGLAND, 4th Edition Volume 1 says that it is not available. At page 111 paragraph 89, it states as follows:

> " The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.' (emphasis added).

41. In the case before court, the statute leaves the respondent with discretion to alter the tariffs and that being the case, the court cannot direct the respondent when, how and to what extent the respondent should alter the tariffs. The court will only interfere in those exceptional cases where it can be demonstrated that in exercising its discretion, the respondent has acted ultra vires the Act, or has taken into account matters which ought not to be taken account or has ignored matters that ought to be taken into account, or the respondent has generally acted arbitrarily, at whim.

42. Turning back to the question of public participation, it is not disputed that indeed there was public participation. In paragraph 11 of the affidavit of Nzeki it has been sworn as follows:

> " 11. That despite holding limited consultative forums, the Respondent failed to meaningfully consider the Applicant's submissions; including the detailed objections raised on 26th February 2025; and proceeded to publish the impugned Tariff Book 2025 without giving reasons or justifications for disregarding critical concerns raised by CFS operators. This failure amounts to a violation of the Applicant's right to fair administrative action and renders the Respondent's decision procedurally unfair and ultra vires."

41. It is, thus, apparent that the applicant's gripe with the respondent is not necessarily that the respondent did not carry out public participation; its primary concern is that its views have not been taken on board or implemented in the impugned decision. In particular, the applicant is concerned that its recommendation for amendment of Clause 15.5 of the tariff book was not acted upon. Apparently, as I understand the applicant, it recommended a uniform application of a certain concession to CFS and ICDs. This is what I gather from the written submissions made in the course of public participation, where the applicant was particular that:

> " ...clause 15.5 which reads "imports and exports handled at ICDs shall be charges 80% of the rates in clause 15.1 to 15.4" amended to read as "Imports and Exports handled at ICDs & CFSs shall be charged 80% of the rates in clause 15.1 to 15.4".

In Nzeki's affidavit, the applicant is said to have recommended 70% as the rate of concessions that should be applied across board.

41. Public participation does not necessarily mean that every view of the stakeholders in the issue for which the participation is sought must carry the day. However, generally speaking, it must be demonstrated that the stakeholders have been given time and space to raise their concerns and make their recommendations. At least this is what I understand the Court of Appeal to have meant in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others, Civil Appeal No 224 of 2017; [2017] eKLR when it held that:

> " 165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic time frame

> for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public. The length of consultation during public participation should be given and the issues for consultation. Mechanisms to enable the widest reach to members of public should be put in place; and if the matter is urgent the urgency should be explained."

41. But for this decision, I would take the view that, beyond the stakeholders being accorded the space and opportunity to be heard, it must be demonstrated that their views, concerns or recommendations were considered or taken into account before the decision in issue is taken. A public participation exercise must be meaningful and consequential; it should not be undertaken merely for the sake of it.

42. That said, the applicant's concern is that its recommendations to amend a particular clause in the tariff book were not effected in the tariff book 2025. Under the current scheme of things, this is not a sufficient ground to impugn a decision on the ground of want of public participation because, from the applicant's own deposition, there was public participation and, most importantly, it made its presentations on the tariff book 2025. The fact that the tariff book 2025 was not amended in the manner recommended by the applicant does not, ipso facto, render the exercise inconsequential.

43. In the final analysis, I find no merit in any of the grounds of judicial review upon which the applicant's application is predicated. The application is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED ON 19 DECEMBER 2025**

**NGAAH JAIRUS**

**JUDGE**