Kenya Ports Authority v Autoports Freight Terminal Ltd (Civil Appeal 76 of 2018) [2023] KECA 978 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 978 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 76 OF 2018

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

JULY 28, 2023

BETWEEN

KENYA PORTS AUTHORITY ..... APPELLANT

AND

AUTOPORTS FREIGHT TERMINAL LTD ..... RESPONDENT

(Being an appeal from the judgement and decree of the High Court of Kenya at Mombasa rendered on 31st January 2018 by Hon Justice P.J. Otieno in Judicial Review Application No 7 of 2016)

JUDGMENT

1. Pursuant to leave granted by the High Court sitting in Mombasa in Judicial Review Application No. 7 of 2016 on 25th January, 2016, the Respondent herein commenced judicial review proceedings by way of the Notice of Motion dated 27th January, 2018. In that Motion the Respondent sought orders prohibiting the Appellant from suspending and or continuing with further suspension of the nomination of containers to the Respondent's Container Freight Station as stated in the Appellant's Letter dated 21stJanuary, 2016; an order of mandamus compelling the Appellant to continue to perform their lawful public duty of nominating containers to the Respondent; and an order of certiorari to call into the Court the decision of the Appellant contained in the letter dated 21st January, 2016 suspending the nomination of containers to the Respondent and to quash the same; and for a provision for costs.

2. The Respondent's case before the trial court, as can be gleaned from its papers filed in the High Court, was that the Respondent was a licenced transit shed Container Freight Station (CFS) pursuant to the provisions of The *East African Community Customs Management Act*, 2004 (hereafter "EACCMA")

3. It was disclosed that in 2014, through tender number KPA/019/2014-15/MO, the Respondent tendered to provide Container Freight Station Services to the Appellant which tender the Respondent

was awarded by a letter dated 22nd August, 2014 and a duly executed Licence Agreement was forwarded to the Respondent dated 21st August, 2014. It was averred that by Gazette Notice No. 1540 of 5th March, 2014, the Appellant duly gazetted that Respondent as a transit shed Container Freight Station under Section 12(1) of the EACCMA operating at plot Numbers 368, 369 and 372 in Mombasa. This, according to the Respondent, was done after the Respondent submitted to the Appellant details of the architectural drawings and other approved designs showing completion of construction works on the transit shed.

4. It was the Respondent's case that before the Respondent was allowed to commence operations as a transit shed, the Kenya Revenue Authority directed the Respondent to execute three bonds in the total sum of Kshs 800,000,000.00 which the Respondent duly did. To do so, it was averred that the Respondent had to demonstrate to the issuer of the said bond that the said sum was readily available from the Respondent hence the Respondent's investment in the said bonds was Kshs 800,000,000.00. The Respondent averred that the cost of construction of an acceptable complete CFS Yard was a minimum of Kshs 2,500,000,000.00, excluding the machines that it had to mandatorily have for its operations.

5. However, on 22nd January, 2016, the Respondent received a letter from the Appellant dated 21st January, 2016 in which the Appellant stated that:

> " It has been decided that nomination of containers to your Container Freight Station (CFS) be suspended with immediate effect".

6. According to the Respondent, the said letter did not disclose the decision makers, the date when the decision was made and the duration of the suspension. The Respondent however contended that it later came to its knowledge based information divulge by the Appellant that the said decision was made on the strength of "instructions from above". To the Respondent, the reasons for the said action were not based on any law. The Respondent was unable to tell whether the letter amounted to an automatic suspension of nomination of containers to the Respondent or it only communicated the decision made, awaiting its formalised implementation.

7. It was the Respondent's case that the Appellant had resorted to matters outside the contemplation of the provisions of the Licence Agreement and the *Kenya Ports Authority Act* (hereafter "the Act") and that the Appellant acted without due regard to the due process of the law and the rules of natural justice in particular, audi alteram partem.

8. It was therefore the Respondent's case that having invested in the Transit Shed, it legitimately hoped that the entire Licence Period of 5 years expressly stated in the Licence Agreement would be exhausted in full, without interruptions being introduced through the process of "suspension" as employed by the Appellant. It was further contended that the Respondent was never made aware of any reason stating the grounds or basis for the said suspension; that the Respondent was never given any chance/ opportunity to be heard by the Appellant yet the action affected the Respondent in a draconian manner; that the Appellant's action violated Article 40 of the *Constitution* as the Respondent's properties together with its massive investment risked going to waste; that the Respondent's action was highhanded and amounted to unfair and discriminatory treatment contrary to the provisions of the *Constitution* and the *Act*; that the Respondent acted irrationally and whimsically considering that the *EACCMA*, 2004 did not authorise the Respondent to suspend the nomination of cargo to the Respondent and that if there were any grounds for revocation of the Respondent as a Transit Shed, such action could only be taken by the Commissioner and not the Managing Director of the Respondent who thereby acted without jurisdiction and authority.

9. It was the Respondent's case that pursuant to Article 3(6) of The Hague Visby Rules, the suspension of the said nomination was likely to affect the Respondent's internationally recognised obligations thereby leading to breaches of contracts at no fault on the part of the Respondent. Therefore, the said letter dated 21st January, 2016 amounted to an unwarranted interference with contractual obligations already entered into between the Respondent and various third parties worldwide.

10. The Appellant's response to the application was that the dispute between the Respondent and the Appellant was contractual in nature and that its breach could only attract private law remedies obtainable in the normal private law suits and not the public law remedies sought in the judicial review application. It was the Appellant's case that as a matter of law and fact, the licencing of a transit shed and the nomination of containers to a licenced transit shed are two very distinct processes.

    It was explained that the appointment of a transit shed merely authorises the goods subject to customs control to be deposited therein but does not lead to an automatic and continued deposit of goods subject to customs control in the transit shed. It was averred that even after gazettement, the decision to deposit cargo at the transit shed is a preserve of the Appellant who may still lawfully decide not to consign any cargo to the transit shed so gazetted. The Appellant however conceded that it delegates some of its statutory powers to the transit shed through the medium of a contract.

11. The Appellant explained that it was in the exercise of such powers that the Appellant entered into the contract dated 21st August, 2014 allowing the Respondent the benefit of having cargo nominated to it on the terms and conditions stipulated in the contract. It was contended that while the appointment of a transit shed is based on a statute, the decision to nominate cargo was a delegation of the Appellant's power done purely by contract with no statutory underpinning and therefore public law remedies sought cannot be granted.

12. While the Appellant appreciated that it had no power to suspend, vary or in any way interfere with an approval issued by the Kenya Revenue Authority, which is an exclusive preserve of the Kenya Revenue Authority, it was the Appellant's case that it did not interfere with or transgress the Respondent's rights as a gazetted transit shed. Its case was that by merely suspending nomination of cargo to the Respondent, it did not deny the Respondent its right to use and own its massive investment as the Respondent has no proprietary right in the cargo nominated to it by the Appellant and can only claim for loss of income which cannot be redressed through public law.

13. According to the Appellant, due to the nature of its operations which may in some instances require that decisions be made urgently, it would be an unnecessary and unlawful complication of the statutory duty imposed upon the Appellant if all its operational policy decisions were to be subjected to the rigors of a hearing before they are implemented as that would be an attempt to curtail its operational discretion bestowed on it by statute.

    It was explained that it was necessary to suspend the nomination of cargo to the Respondent due to several issues that were prevailing at that time including persistent misdirection of cargo, at the Respondent's shed leading to investigations being undertaken which militated against the Respondent being informed of the same.

14. According to the Appellant, there was no requirement that the identity of the specific officer making the decision be disclosed provided that the decision was made by an authorised officer of the Appellant. While the decision maker may be unknown to the consumer, it was contended that it was known to the Appellant. The Appellant justified the action of seeking guidance "from above" on the ground that the decision was made with wider government policy in mind.

15. It was the Appellant's case that there was no guarantee that the contract with the Respondent would not be terminated before the expiry of the five years hence the Respondent's claim based on legitimate expectation had no basis. It was therefore contended that the Appellant's action was not irrational and unreasonable.

16. In his judgement, the Learned Judge, based on the terms of the Licence Agreement, found that the parties understood, while entering the agreement that there was a statutory duty placed upon the Appellant to perform some functions and that it was such statutory functions the Appellant was outsourcing to the Respondent. Therefore, the Learned Judge found, the agreement was bestowing upon the Respondent the right and capacity to do what only the Appellant was by law permitted to perform and thereby delegating its statutory functions to the Respondent vested upon the Appellant by the provisions of Section 12(2)(n)(ii) of the *Act*. The Learned Judge therefore found that the relationship between the parties as created under the Licence Agreement was contractual but with clear and undoubted statutory underpinnings. In the view of the Learned Judge, it is an established principle of law that where a contract finds its legitimacy and existence on a statutory provision bestowing some right or duty on a public body the application of judicial review is invited and the court cannot shut its eyes and reject an application purely because it has contractual undertones and elements in its character. He grounded his finding on this Court's decision in *Republic v Mwangi S. Kaimayi, exparte Kenya Institute of Public Policy and Research Analysis* [2013] eKLR.

17. The Learned Judge concluded that in ceding its statutory functions to the Respondent, the Appellant was performing a public duty bestowed by a statute and that once it did so it could only revisit that delegation lawfully and relied on Section 12(3) of the *Act*. In finding that the action of the Appellant was amenable to judicial review, the Learned Judge relied on the decision of Emukule J in *Republic v Kenya Ports Authority. Ex parte Portside Freight Terminals Ltd* J.R. No. 6 of 2016.

18. The Learned Judge further found that the decision communicated to the Respondent by the letter of 21st January, 2016 by the Appellant suspending nomination of cargo to the Respondent's CFS was made by the Appellant courtesy of its powers under Cap 391 and was thus made in its character and identity as a public body performing public duty of handling cargo imported into the county and to that extent it was a statutory duty amenable to the court powers in judicial review; and that the decision, being subject to the dictates of *Fair Administrative Act* failed to meet the test of a fair, lawful and legal decision; and that the decision was unmerited, oppressive and in violation of the Respondent's right to a fair hearing and fair administrative action.

19. The Learned Judge proceeded to quash the said letter together with the decision it purported to convey to the Respondent and prohibited the Appellant from further suspension of nomination of containers to the Respondent on grounds other than legal, in accordance with terms of the Licence Agreement and in full observance and compliance with the law and the rules of natural justice. He issued an order of mandamus directed at the Appellant compelling it to perform its public duty of offering port services in accordance with the law and without arbitrariness and blatant departure from the written law and rules of natural justice. The Learned Judge also awarded the costs of the proceedings to the Respondent.

20. It was this decision that aggrieved the Appellant herein and provoked the present appeal which we heard on the Court's virtual platform on 1st November, 2022. Learned Counsel Mr Billy Kogere appeared for the Appellant while Mr Paul Buti appeared for the Respondent.

21. It was submitted on behalf of the Appellant that the mere fact that statute permits the entry into a contract, does not mean that the resulting contract becomes statutorily underpinned. This submission was based on this Court's decision in *Eric V. J. Makokha & 4 others v Lawrence Sagini & 2 others* [1994]

eKLR and *Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)* [2013] eKLR and *Griffith University v Tang* [2005] HCA 7.

22. It was further submitted that statutory underpinning cannot be acquired simply because the contract expressly refers to a statutory duty and reference was made to *Hampshire County Council v Supportways Community Services Ltd* [2006] EWCA Civ 1035.

23. The Appellant contended that the Respondent's submission that the fact that other government agencies were involved in the licensing of CFSs was evidence of a statutory underpinning of the contract was not one of the grounds relied on by the Learned Judge. That, pursuant to Rule 94 of the *Court of Appeal Rules* 2010, it cannot be relied upon unless the Respondent filed a Notice of Grounds for Affirming Decision. In any case, the mere involvement of other government agencies in the business of a CFS could not convert an otherwise ordinary contract into one with statutory underpinning.

24. According to the Appellant, Article 47 was not engaged at all since this was not an administrative action but a contractual discretion. However, assuming that Article 47 was engaged, the Appellant submitted that the said provision is neither absolute in its command nor rigid in its application. In the Appellant's submission, the High Court has thought it flexible where "there is need to take preventive or remedial action" (*Republic v NonGovernmental Organizations Co-ordination Board Ex-Parte Research, Care and Training Programme Family Aids Care & Education Services (Rctp-Faces)* [2016] eKLR) or "where it is impracticable to give prior notice" (*Republic v Kenyatta University & another Ex- parte Wellington Kihato Wamburu* [2016] eKLR). It was submitted that had the Learned Judge appreciated that the right is inflexible, he would have found that the facts here justified the initial non-compliance by the Appellant.

25. It was the Appellant's case that the order of mandamus is a most exceptional order and its scope is limited to performance of a public duty where statute imposes a clear and unqualified duty to do that act but does not issue if the duty is discretionary as to its implementation. According to the Appellant, the manner in which the relief was sought could not be granted hence the Learned Judge ended up granting a relief that was not sought by the Respondent and in the process condemned the Appellant unheard.

26. Based on the foregoing, we were urged to allow the appeal with costs.

27. The Respondent on the other hand submitted that the Appellant having withdrawn its application in which it was seeking to have the leave granted to the Respondent set aside on the ground of jurisdiction, the Appellant was estopped from raising the same issues, it had intended to raise in the withdrawn application as grounds for opposing the main motion.

28. It was further submitted that since the Licence Agreement was entered into pursuant to the powers conferred on the Appellant by Section 12 of the *Kenya Ports Authority Act*, this was the "Statutory underpinning" of that Agreement; that the powers conferred on the Respondent by virtue of the said Licence Agreement were delegated by the Agreement to be performed by the Respondent; that since they are functions that have their origin and mandate in the provisions of Section 12 of the *Act*, their performance cannot be extricated or separated from the parent Act that has allowed their delegation and that their performance must be within the parameters set out in the *Act*; and that that since the Licence Agreement falls squarely under these provisions of the Act, anything done by the Appellant in matters related thereto is done in its capacity as a statutory body and not otherwise and there being nothing in the nature of a private arrangement, and the contract having been entered into in accordance with the strict and specific terms of the provisions of Section 12 of the *Act*, the argument by the Appellant that this is a private contract falls by the wayside.

29. It was therefore submitted that the relationship between the parties as created under the agreement, though contractual, had statutory underpinnings and reference was made to this Court's decision in *Republic v Mwangi S. Kaimayi, exparte Kenya Institute of Public Policy and Research Analysis* [2013] eKLR.

30. Based on the said decision it was submitted that, in this appeal, violation of fundamental rights were alleged and proved and the trial court found that the conduct of the Appellant was a direct interference and deprivation of the Respondent of its investment. In those circumstances it was asserted that the remedy of judicial review was available to the Respondent.

31. It was further submitted that the public nature of the duties and functions undertaken by both parties in this Agreement, involved Kenya Revenue Authority and other Government agencies; that the Respondent was duly gazetted on the 5th March 2014, vide gazette Notice No. 1540 pursuant to the provisions of Section 12 of the *East Africa Community Customs Management Act* 2004; that such gazettement, which is a pre-requisite before the Appellant entered the Agreement of 21st August 2014, is gazettement done pursuant to Statute; and that any suspension or revocation of the operations of the Respondent could only be done by the Commissioner of Customs by Notice in the Gazette pursuant to Section 12(3) of *EACCMA*.

    In this regard, reliance was placed on the decision of Emukule, J in *Republic v Kenya Ports Authority. Exvarte Portside Freight Terminals Ltd* (*supra*), and to support its case, the Respondent drew our attention to the elaborate procedure of appointment and involvement of the *EACCMA* and the Commissioner of Customs of the Kenya Revenue Authority, particularly the recognition therein that "whatever cargo is handled by the Respondent, will be subject to verification by other Government Agencies" as confirmed by the gazettement of the Respondent as a Transit Shed. It was also noted that since the Licence Agreement does not provide for its "suspension" the action taken by the Appellant could not have been made pursuant to the contract and therefore was not contractual as alleged.

32. It was therefore submitted that the letter was written in direct contravention of Section 7(2)(a) of the *Fair Administrative Action Act* (hereafter FAAA) which requires the Court to determine whether the maker of the decision had authority to make the same; that no reasons have been given for the "suspension" contrary to the provisions of both Article 47 of the *Constitution*, and Section 4(2) of *FAAA*; that the Respondent was not given an opportunity to be heard, before that decision was made contrary to Section 4(3) and Section 7(2) (a) (v) of the FAAA; and that the existence of the alleged reasons that are made the basis of the suspension were ambiguous and incapable of being properly understood, for a proper response.

33. It was the Respondent's case that both the *Constitution* and the relevant Act of Parliament, enacted pursuant to Article 47(3) of the *Constitution*, which impose no limitations on the scope of judicial review were violated.

34. For these reasons, it was prayed that the appeal be dismissed.

Analysis and Determination

35. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate was re-affirmed in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 where this Court held that:-

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that

it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

36. We have set out the respective cases for the parties at the beginning of this judgement. It is clear as properly appreciated by the Appellant that the two issues that substantively fall for determination in this appeal, and were determined by the trial court are first, whether the issue before the trial court was a contractual issue not amenable to public law remedies; and secondly, whether there was merit in the Motion. Depending on how the first issue is determined, the second issue may not fall for determination.

37. However, the Respondent raised the issue that the Appellant having withdrawn its application in which it sought to have the leave granted by the trial court set aside on the ground of jurisdiction, the Appellant is estopped from alleging that the trial court had no jurisdiction to entertain the Motion,the issue in dispute being purely contractual.With due respect to the Respondent, we find no merit in this submission. The parties withdrew their respective applications in order to pave way to the hearing of the main motion. They did not expressly abandon their argument as regards jurisdiction. In any case an issue going to jurisdiction may be raised at any time and even if not raised, the law is that a court is obliged to determine whether or not it has jurisdiction before proceeding with a matter. Accordingly, we find that nothing turns on that submission.

38. In order to determine the first issue, it is important to set out, albeit briefly, how the parties herein found themselves before the High Court. The Respondent operates a Container Freight Station (hereafter 'CFS') licensed as such by the Appellant vide a License Agreement dated 21st August 2014. As a CFS, the Respondent is contracted to discharge some of those functions which statute has bestowed on the Appellant. In that contractual arrangement, the Appellant allows cargo offloaded from ships at the port of Mombasa to be transferred directly to the CFS even before customs duty is paid. This action of allowing cargo from a ship to be offloaded to the CFS is referred to as "nomination".

    By a letter dated 21st January 2016 the Appellant, through its Managing Director, informed the Respondent that a decision had been made to suspend any nomination of cargo to the Respondent's CFS until further notice. It was this decision that set into motion the actions leading to the commencement of the proceedings by way of judicial review.

39. According to the Appellant, the licencing of a transit shed and the nomination of containers to a licenced transit shed are two very distinct processes. While conceding that it delegates some of its statutory powers to the transit shed through the medium of a contract, the Appellant maintained that the appointment of a transit shed merely authorises the goods subject to customs control to be deposited therein but does not lead to an automatic and continued deposit of goods subject to customs control in the transit shed and that after gazettement, the decision to deposit cargo at the transit shed is a preserve of the Appellant who may still lawfully decide not to consign any cargo to the transit shed so gazetted.

    It was contended that while the appointment of a transit shed is based on a statute, the decision to nominate cargo was a delegation of the Appellant's power done purely by contract with no statutory underpinning and therefore public law remedies sought cannot be granted.

40. The distinction between the actions that amount to public law disputes on one hand and private law disputes for the purposes of judicial review is never that easy to determine. This Court in *Peter Okech*

Kadamas v. Municipal Council of Kisumu [1985] KLR 954; [1986-1989] EA 194 grappled with the said determination and held that:

> " The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies... At present it is not entirely easy to decide what is a private law matter as distinct from a public law matter."

41. That there is no bright line between private law and public law was similarly appreciated by the South African Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa & Another v Minister of Health Case* CCT 31/99.

42. This distinction has been further blurred by the enactment of the *Fair Administrative Action Act*, 2015 a statute enacted pursuant to the Article 47 of the *Constitution*. Section 2 thereof defines "administrative action" to include:

    i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

    ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

43. The same section defines 'administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

    (1) This Act applies to all state and non-state agencies, including any person

        a. exercising administrative authority;

        b. performing a judicial or quasi-judicial function under the *Constitution* or any written law; or

        c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

44. In this case, it is contended by the Respondent that the contract between the Appellant and the Respondent was intertwined with the appointment of the Respondent and its delegated functions as to have statutory underpinning. The issue of what amounts to statutory underpinning was dealt with by this Court in *Eric V J Makokha & 4 Others v Lawrence Sagini & 2 Others* Civil Application No. Nai. 20 of 1994 where the Court expressed itself as follows:

> " The word "statutory underpinning" is not a term of art. It has a recognised legal meaning. Accordingly, under the normal rules of interpretation, the Court should give it its primary meaning. To underpin, is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean, the employee's removal was forbidden by statute unless the removal met certain formal laid down requirements. Pure master and servant cases...mean there is no element of public employment or service in support by statute, nothing in the nature of an office or status which is capable of protection. If any of these elements exist, there is, whatever the terminology used and though in some inter partes aspects, the relationship may be essential procedural requirements to be observed and failure to observe them may result in a dismissal being declared null and void...What it means is that some employees in public positions may

have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words "statutory underpinning."

45. From that holding, and for the purposes of this appeal, if the relationship between the Appellant and the Respondent originates from and terminates with the Licence Agreement, there would be no difficulty in finding that this is purely a contractual matter whose breach would not invite public law remedies. Similarly, the mere fact that a statute empowers a body to enter into a contract does not necessarily give rise to statutory underpinning if the contract is self-contained in the sense that it contains all the relevant terms including the mode of its termination without reference to another body outside the contractual agreement. This is our understanding of the decision in *Hampshire County Council v Supportways Community Services Ltd* [2006] EWCA Civ 1035 that;

> " The fact that a contractual obligation is framed by reference to a statutory duty does not, in my view, render that obligation a public law duty."

46. That was the same view held in *Griffith University v Tang* [2005] HCA 7 where it is noted that;

> " A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties."

47. Therefore, where the statute grants power to a statutory body the capacity to contract, without more, the resulting contract cannot be said to have statutory underpinning. Accordingly, the question that falls for determination is whether there was "more" in the circumstances of the case before us. In this case, the appointment of the Respondent as a transit shed Container Freight Station was by Gazette Notice No. 1540 of 5th March, 2014. That appointment was made pursuant to Section 12(1) of the *EACCMA*. The Licence Agreement dated 21st August, 2014 was forwarded to the Respondent after the Respondent successfully tendered to be nominated as a Container Freight Station. One of the conditions for appointment of a facility as a transit shed is that:

> " Cargo destined for Kenya shall be consigned to Kilindini Port and the mechanism for allocation of cargo between Transit Sheds, shall be determined jointly by Kenya Ports Authority and Kenya Revenue Authority."

48. It is clear that in so far as the contract between the Appellant and the Respondent was concerned, apart from the Licence Agreement, the determination of the mechanism for allocation of cargo to the Respondent's Transit Sheds, was to be arrived at jointly by Kenya Ports Authority and Kenya Revenue Authority. There was no provision for the suspension of the nomination of the Respondent as Container Freight Station.

49. It has been held that whether or not a contract has statutory underpinnings entitling a judicial review court to have jurisdiction is not usually a straightforward affair. That the court has power to consider for example whether the source of power is statute, in order to assume jurisdiction and, sometimes whether the power giving rise to the decision is a contract or statute; whether there are two or more decision makers; and whether the target body carries a public function in which case the test is not the source of power but the nature of the power.See *R v Panel on Take Overs and Mergers, Ex Parte Datafin Plc* [1987] QB 815 at 827a-b.

50. In this case, it is clear that what was contracted were statutory powers conferred on the Appellant which the Appellant was delegating to the Respondent to perform. It was not just an ordinary contract for, say, sale of goods or for services to be rendered to the Appellant. In our view, the elaborate statutory procedure for appointment of the Respondent as a Transit Shed in order to benefit from the nomination as a Container Freight Station, coupled with the fact that the Agreement did not provide for the suspension of the nomination by the Respondent, leads us to the conclusion that the relationship between the Appellant and the Respondent was not simply guided by the Licence Agreement, but was subject to oversight by other bodies other than the Appellant, and was subject to the provisions of the *Kenya Ports Authority Act* and *EACCMA*. We are persuaded by the decision of Emukule, J in *Republic v Kenya Ports Authority. Ex parte Portside Freight Terminals Ltd* J.R. No. 6 of 2016 that:-

> "In any event the respondent itself has admitted that the licence agreement does not provide for 'suspension' therefore indicating that the respondent must have derived the power to suspend nomination of cargo to the experte applicant's CFS from instruments other than the licence agreement thereby subject it to the process of judicial review."

51. In the foregoing premises and in light of the provisions of the *Fair Administrative Action Act* we find that the action of the Appellant was amenable to judicial review.

52. As regards the merit of the application, it is now clear that judicial review remedies can be granted on grounds of ultra vires, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision. See Judicial Review Handbook 6th Edition by Michael Fordham.

53. This Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in *R v Panel on Take Over and Mergers Ex Parte Datafin* [1987] QB 815, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing.

54. The *Constitution* of Kenya, 2010 by enacting Article 47 recognises the right to fair administration elevated judicial review relief to a constitutional pedestal. Therefore, just like in South Africa, judicial review is no longer just a common law relief but a constitutional one. Chaskalson, J. in the South African Case *Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others* (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674 expressed himself as hereunder:

> "Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead, the *Constitution* itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication

of a refusal of a request to provide reasons for administrative actions involves the direct application of the *Constitution*."

55. In our case, Article 47 of the *Constitution* from which the *Fair Administrative Actions Act* is derived provides that:

    1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

56. Section 7(2) of the *FAAA* provides that:

    A court or tribunal under subsection (1) may review an administrative action or decision, if–

    a. the person who made the decision–

        i. was not authorized to do so by the empowering provision;

        ii. acted in excess of jurisdiction or power conferred under any written law;

        iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;

        iv. was biased or may reasonably be suspected of bias; or

        v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

    b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

    c. the action or decision was procedurally unfair;

    d. the action or decision was materially influenced by an error of law;

    e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

    f. the administrator failed to take into account relevant considerations;

    g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

    h. the administrative action or decision was made in bad faith;

    i. the administrative action or decision is not rationally connected to–

        i. the purpose for which it was taken;

        ii. the purpose of the empowering provision;

        iii. the information before the administrator; or

        iv. the reasons given for it by the administrator;

j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k. the administrative action or decision is unreasonable;

l. the administrative action or decision is not proportionate to the interests or rights affected;

m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n. the administrative action or decision is unfair; or

o. the administrative action or decision is taken or made in abuse of power.

57. In this case, the Respondent was never afforded an opportunity of being heard before the decision to suspend its nomination was made. The Appellant has justified this on the ground that there were investigations being undertaken against the Respondent, not by the Appellant, but the Kenya Revenue Authority. In the letter suspending the Respondent's nomination, this was not disclosed. It was simply stated that:

> " It has been decided that nomination of containers to your Container Freight Station (CFS) be suspended with immediate effect".

58. There was no disclosure as to who the decision maker was and whether the decision maker was authorised to make such a decision. There was no indication as to the period of the suspension and no reason for the suspension was given at all. The Respondent was entitled to know the reason why nomination was being suspended, who the decision making maker was, the period of the suspension and whether it would be afforded an opportunity of being heard even in future. It was contended which contention was not denied that the Appellant later informed the Respondent that the suspension was based on "instructions from above" creating an impression that the suspension was mooted by other forces other than the Appellant. According to the Appellant what mattered was that the decision maker was known to the Appellant. With respect, that view does not hold. It is the Respondent that was required to have knowledge of who made the decision otherwise it would amount to an unlawful delegation of power and authority.

59. Having regard to the foregoing, we agree with the learned judge that the Respondent's decision did not meet the test of fairness. As to whether the trial court could craft the orders in the manner it did, Section 11(1) of the *FAAA* provides that the Court may grant any order that is just and equitable. The Appellant has not satisfied us that the order, as issued, was not just and equitable.

60. In the premises, we find no merit in this appeal which we hereby dismiss with costs to the Respondent.

61. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR