IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WARSAME, KIAGE & MURGOR JJ.A)

CIVIL APPEAL NO. 166 OF 2018

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

VERSUS

1. WILLIAM ODHIAMBO RAMOGI

2. ASHA MASHAKA OMAR

3. GERALD LEWA KITI

4. ATTORNEY GENERAL

5. CABINET SECRETARY, MINISTRY OF TRANSPORT & INFRASTRUCTURE

6. KENYA RAILWAYS CORPORATION

7. MUSLIMS FOR HUMAN RIGHTS

8. MAINA KIAI

9. COUNTY GOVERNMENT OF MOMBASA.....RESPONDENTS

(Being an appeal from the Ruling and Orders of the High Court of Kenya

at Mombasa (Hon. Achode, Ngugi, Nyamweya, Ogola and Mrima, JJ)

delivered on 2nd November, 2018 in Constitutional Petition No. 159 of 2018)

JUDGMENT OF THE COURT

The appeal challenges the whole ruling and orders delivered on 2nd November, 2018 by five judges of the High Court – Hon. Achode, Ngugi, Nyamweya, Ogola and Mrima JJ., - with respect to the appellant's Notice of Motion dated 12th June, 2018 and the 4th and 5th respondents' preliminary objection dated 24th September, 2018. The 4th respondent also filed a cross appeal dated 6th February, 2019 raising grounds largely similar to those raised in the appeal.

The 1st to 3rd respondents are petitioners before the High Court. Their petition arises out of a Take or Pay Agreement dated 30th September, 2014 between the appellant and 6th respondent in which the appellant is obligated to consign a set volume of containers through the Standard Gauge Railway to the appellant's Inland Container Deport in Embakasi, Nairobi. They state that the port of Mombasa run by the appellant is the Kenya entry and exit point for overseas cargo destined to a vast hinterland including Kenya, Uganda, Rwanda, Burundi, Democratic Republic of Congo, Tanzania, South Sudan, Somalia and Ethiopia. The port has led to the creation of employment through road transport, cargo handling, clearing and forwarding agencies and container freight stations, accounting for 40% of the economy of Mombasa County. The respondents have three broad complaints.

First, that consigning of containers has the effect of causing loss of jobs for Mombasa residents, higher cost of doing business and living

owing to the inefficiency of the Inland Container Depot. Second, the port should benefit the people of Mombasa since the high environmental degradation occasioned by port activities affects them most and that the Inland Container Depot should be developed within a radius of 100 to 150 kilometres of the port of Mombasa to support the surrounding undeveloped counties. The final complaint is premised on the perceived principles of devolution and best practices from major ports in line with Article 186 and the Fourth Schedule of the Constitution.

They contend that the activities by the appellant, the 5th and 6th respondents infringe their constitutional rights to fair administrative action under Article 47, will infringe their economic rights under Article 43 and are in violation of the principles of devolution in Articles 174 and 186. For that, they seek various orders and declarations set out in their petition.

In response, the appellant filed an application to strike out the petition on the grounds that it offends the dispute resolution mechanism in section 34 of the Inter-governmental Relations Act; it is *res judicata* ***Mombasa Civil Appeal No. 15 of 2017 Mombasa County Government vs. Kenya Ferry Services Limited & 2 Others***; it is an invitation to the court to legislate on policy guidelines, of which the 1st to 3rd respondents lack *locus standi*; it is *sub judice* Mombasa High Court Petition No. 80 of 2018 ***Makupa Transit Shed Limited & 14 Others vs. Kenya Ports Authority & Another*** and that it is instituted with ulterior motive to advance or protect private or political interests. The 7th to 9th respondents successfully joined the proceedings as interested parties. The 4th and 5th respondents also filed a preliminary objection contesting the court's original jurisdiction on the basis of Articles 6, 159 (2) (c) and 189 (3) and (4) of the Constitution and sections 30 to 35 of the Intergovernmental Relations Act.

The appellant's application seeking to strike out the petition and the preliminary objection were heard jointly resulting in the impugned ruling. In its ruling the High Court framed five issues for determination. On the first issue on whether the petitioners are barred by Articles 6 and 189 of the Constitution as read with section 30-35 of the Inter-governmental Relations Act from approaching the court with their grievance at the first instance, the High Court held that the dispute at hand was not an inter-governmental dispute; that IGRA does not apply to the controversy and the petition is properly before the court in the first instance. On the second issue, the court also held that the dispute is not *res judicata* Constitution Petition No. 9 of 2016 and Civil Appeal No. 15 of 2017 as the parties in the matters are different and the issues raised substantially different and distinguishable. On the third issue, the court found that the petition cannot be said to be *sub judice* and/or an abuse of the court process on the basis of existence of Petition No. 80 of 2018. The court also affirmed that the petitioners had the requisite *locus standi* and declined the appellant's invitation to decline exercising jurisdiction for prudential reasons by dint of the non-justifiability doctrine. Consequently, the Notice of Motion and the preliminary objection were found to be unmerited and were dismissed with costs to be in the cause.

The appellant was not satisfied with this decision and appealed against it on seven grounds which can be reduced into the following three broad grounds:-

> ***(a) The High Court lacks jurisdiction to entertain the petition wholly or partially;***
>
> ***(b) The petition is res judicata;***
>
> **(c)** ***The petition is sub judice***.

On its part, the 4th respondent cross appeal raised the following three grounds:-

> ***(a) The High Court erred in finding that the petition was not an inter-governmental dispute and they further overlooked the position taken by the 9th respondent as an interested party that enhanced the dispute;***
>
> ***(b) The High Court erred in law by overlooking the provisions of Articles 6, 159 (2) (c) and 189 (3) and (4) of the Constitution read with sections 30 to 35 of the Inter-governmental Relations Act vis a vis the fundamental human rights under Article 23 (1) of the Constitution when they held that there were justiciable issues before court and overlooked that they lacked jurisdiction to determine the inter-governmental issues in the present issues.***
>
> ***(c) The Learned Judges erred in law by holding the doctrine of exhaustion was not applicable and failing to appreciate that the petition cuts across fundamental human rights and inter-governmental issues and the latter should be determined via alternative dispute resolution mechanisms and thus the High Court lacks jurisdiction on the matter.***

All parties filed written submissions in support of the positions advanced. Only the 6th respondent supports the appeal and cross appeal. The parties through their respective counsel highlighted their submissions orally before us. Prof. Githu Muigai, Senior Counsel; Nani Mungai & G. Imende appeared as counsel for the appellant while Nguyo Wachira, State Counsel appeared for the cross appellant, the 4th and 5th respondents. Ms. Caroline Oduor and Gerald Sharon appeared for the 1st, 2nd and 3rd respondents, Ms Anne Kaguri appeared for the 6th respondent, Willis Otieno for the 7th and 8th respondents and Pheroze Nowrojee,SC held brief for MMA Advocates LLP, on record for the 9th respondent.

In summary, parties reiterated their respective positions as advanced before the High Court and captured in the impugned ruling. We see no need to repeat the same save for emphasis. Prof. Githu SC emphasized that no matter how the dispute is dotted, it is an inter-governmental dispute as the national government is responsible for the appellant. He cited the applicability of section 34 of the Inter-Governmental Relations Act. He emphasized that the 1st to 3rd respondents are proxies of the 9th respondent with the only legitimate question being whether the port should be managed by the County or National Government, which question cannot be commenced at the High Court. He faulted the High Court for creating a fallacy that it is the only institution that protects human rights. He reiterated the exhaustion principle submitting that the High Court's approach would unnecessarily clog the system as the litigants will end up avoiding the prescribed mechanisms in favour of the High Court litigation.

Mr. Nani Mungai submitted on the *res judicata* and *sub judice* grounds. He urged that the judgment in **Petition 9 of 2016** is a judgment in rem and the court therein dealt with the Kilindini Canal which cannot be separated from the harbor. He reiterated that the petition before the High Court raised two issues – enforcement of economic rights and the inter-governmental rights, the latter being res judicata. On *sub judice*, he submitted that while the parties may not be the same, the broader issues are the same and there should only be one outcome in the two High Court Petitions.

State Counsel Wachira argued that the 9th respondent being a party to the suit, the dispute turned into an inter-governmental dispute in the wake of prayer (b) of the petition and 9th respondent should initiate and exhaust the alternative dispute resolution mechanism set out in the Constitution.

Ms. Kaguri for the 6th respondent supported the appeals.

Ms. Oduor argued that the main cause of action is enforcement of Article 43 of the Constitution and the other issues merely contextualized and explained the complaint. Article 159 of the Constitution, she argued, does not oust the court's jurisdiction but guides the dispute resolution through a set procedure. She insisted that the petitioners are neither county nor national government and the 9th respondent is an interested party with its identifiable stake in the dispute. It was therefore premature to suggest that the 9th respondent cannot participate in the petition before the High Court. She submitted that section 34 of the Inter-Governmental Relations Act is inapplicable, as the High Court's jurisdiction is only ousted by Article 165 (5) of the Constitution – matters reserved for the Supreme Court or falling within the jurisdiction of specialized court of the same status under Article 162 of the Constitution. Counsel was adamant that the suit is neither *sub judice* nor *res judicata* as argued by the appellant and cross appellants.

Mr. Willis Otieno for the 7th and 8th respondents invited us to consider the impugned Agreement in light of fundamental rights which fall under the High Court's jurisdiction under Article 165 of the Constitution. He further submitted that sections 31 and 32 of the Inter-Governmental Relations Act are inapplicable and by virtue of Article 50 of the Constitution, the right to fair trial required that the dispute be decided by court as the right in non derogable. He pointed out that no party including the appellants objected to the reference of the dispute to the High Court for determination by Justice Ogola at the first instance. On *sub judice*, he submitted that the parties had agreed that the two petitions pending before the High Court be heard together.

On his part, Mr. Nowrojee SC submitted that no argument had been advanced as to why the Judges erred, as the appellant has not answered the legal statements of law made by the Judges on the applicability of the Constitution. He equally submitted that the appeal is misguided and misplaced on all the issues raised.

In reply, Mr. Imende conceded that the parties consented to the empanelling of 5 Judges but added that jurisdiction cannot be conferred by parties. He submitted that one of the issues for determination is the function to be performed by the County Government which makes the dispute an inter-governmental dispute. It is fundamental therefore to determine whether the parties are properly before the High Court or whether the dispute should be referred to the Inter-Governmental Relations Act mechanisms.

Rule 29 (1) (a) of this Court's Rules is instructive on our mandate on a first appeal to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved, the exercise of which is called to our interrogation, we remain guided by the principles enunciated in ***Mbogo vs. Shah*** ***[1968] EA 93*** that we will not interfere unless we are satisfied with the Judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. The Court of Appeal derives it appellate jurisdiction from **Article 164 (3)** of the Constitution and **section 3 (1)** of the Appellate Jurisdiction Act to hear appeals from the High Court such as the present appeal.

Framing of Issues and Analysis

We are of the view that the appeal and cross appeal can be determined on the basis of the following issues:

(a) Whether the High Court has jurisdiction at the first instance;

(b) Whether the dispute is res judicata

(c) Whether the appeal is sub judice.

In essence, the appellant and the cross appellant seek to have the petition struck out, for want of jurisdiction by the High Court, should they succeed before us.

On the first issue, it is common ground that the challenge on jurisdiction by the High Court is made on the basis of the nature of the dispute. The contention, as we perceive it, is not on the applicability of the Constitutional and statutory dispute resolution mechanism of the Inter-governmental Relations Act but on whether the present dispute should be characterized as an inter-governmental dispute. The answer to that question automatically cascades the dispute into the applicable legal regime such that if indeed it is an inter-governmental dispute, then the petition should be struck out and pave way for the requisite dispute resolution mechanisms to the exclusion of the High Court at the first instance. The importance of jurisdiction cannot be emphasized any more than it has already been done since the decision in ***The Owners of Motor Vessel "Lillian S"*** ***(1989) KLR 1.*** Jurisdiction is everything and it is only conferred by the Constitution or statute. Parties cannot do so by consent or otherwise. Whenever a challenge to jurisdiction is raised, the same has to be addressed as a threshold issue. It is therefore not farfetched that the issue has to be addressed notwithstanding that it was not raised before the single Judge, Ogola J., or before the panel of 5 Judges was constituted by the Honourable Chief Justice. We find it imperative to address the issue on its merits.

The jurisdiction of the High Court is derived from **Article 165 (3) and (6)** of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation

of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in ***Republic vs.***

Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

The appellants and cross appellants do not seem to challenge the approach taken by the High Court but instead place a lot of weight on the eventual inclusion and the position adopted by the 9th respondent in the suit. On this, we are persuaded by Lenaola J, as he then was in ***Law Society of Kenya vs Cabinet Secretary, Ministry of Lands, Housing and Urban Development & 3 Others [2017] eKLR*** when he interrogated the extent to which an interested party can support the petitioner and held as follows:

> ***"73… The support of the Petition by the Interested Party did not also yield much because the Interested Party merely, by litigational genius tried to create its own case out of a simple matter of a tax imposed for the construction of the Petitioner's arbitration centre which had nothing to do with it. It must always be remembered that an Interested Party's case should not be different from the case between an applicant/petitioner and a respondent otherwise mutational cases will only lead to convoluted and confused cases which would do nothing more than impede the administration of justice."***

In that case, the interested party, which is a county government just like the 9th respondent, sought to pursue a more aggressive position of arguing its own case over and above that which the petitioner had brought. We do not think the 9th respondent went to such length and even if it did, the above holding is instructive. Moreover, the main prayers sought by way of declarations in the petition are limited to those within the enforcement of social and economic rights.

We now turn to the next issue as to whether the matter is *res judicata*. In addressing this, we note that the Judges appraised themselves on the applicable test to the doctrine of *res judicata* as enunciated in ***Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 Others [1996] eKLR.***

These are, that there must be a previous suit in which the matter was in issue, the parties were the same or litigating under the same title, a competent court heard the matter in issue and the issue has been raised once again in a fresh suit. In addition, the Judges considered the applicability of the doctrine as it relates to Constitutional petitions. Applying each of the tests to the cited cases of **Constitution Petition No. 9 of 2016** and **Civil Appeal No. 15 of 2017,** the Judges found that the parties in the matters were different and the issues raised substantially distinguishable. We have also done the same and see no need to repeat the findings which are similar to the trial Judges. We only add that the previous decisions raised the division of the transportation function between the National and County Government of Mombasa, specifically the function of operating ferries and harbours, in which it was found by the Court of Appeal that the Likoni Channel is an international waterway, and part of the marine navigational system. Our perusal of the present petition reveals that the issue raised goes beyond the Likoni Channel and focuses on the post docking processes of cargo offloading, clearing and forwarding and transportation of cargo to the International Container Depot. This is all done in the context of the pursuit of economic rights under Article 43 of the Constitution arising out of the impugned agreement.

What about *sub judice?* The High Court Judges did ask themselves this before answering the question as to whether the petition is similar to the matter in **Petition 80 of 2018**.The purpose of this legal principle is to avoid multiplicity of suits by the same parties over the same issues. Again the Judges put the principles to test and noted that while some of the issues are similar, the petitions are not identical. It is apparent that from the said impugned agreement, different causes of actions could arise as the agreement affected parties differently. The invocation of the impugned agreement by itself in different cases does not render the matter *sub judice*. In any event, the challenge subject to the present petition is the agreement in its entirety and not just an aspect of it as is the case in the **Constitution Petition No. 80 of 2018.** We therefore decline the proposition that the petition is *sub judice* and we see no basis to interfere with the analysis and determination of the learned Judges of the High Court.

As to the contention that the 1st to 3rd respondents are proxies of the 9th respondent or the Container Freight Stations, who are the respondents in the **Constitution Petition No. 80 of 2018**, the appellant and cross appellants have not demonstrated the link between the parties. In the petition, the 1st to 3rd respondents merely described themselves as residents who work for gain in Mombasa and filed the petition on their own behalf. As per paragraph 6 of their amended petition, it is apparent that they have additionally filed the petition in public interest, as a result of the agreement's implications on the people of Mombasa County and their dependants. This wide standing may as well incorporate the interest of the 9th respondent or the Container Freight Stations. They have however not sought to advance any specific interest of the Container Freight Stations to warrant the inference that the appellant and cross appellant wish us to draw on the 1st to 3rd respondents' capacity to pursue the petition. Before we conclude, we note that the appellant in its written submissions fault the learned Judges of the High Court for not considering the ulterior motive argument that the petition seeks to advance in protection of private or political interest. This argument has not been made out in any of the grounds of appeal as per the memorandum of appeal before us. We would therefore not wish to belabor the same any further.

One final issue, which is paramount to the appeal before us, is that the notice of motion dated 12th June, 2018 and preliminary objection dated 24th September, 2018 were on striking out of the petition, for the reasons we have set out hereinabove. The well-trodden path on striking out of pleadings is clear and from the plethora of issues, which are Constitutional, statutory and factual, it is important to say that the issues canvassed before the High Court and before us are largely contentious and therefore unfit for determination through a process that is summary in nature. The Constitutional and statutory issues raised in the petitions are not matters that can easily and clearly maneuver the petitioners out of the seat of justice. Again the appellant's case does not seek to stay the petition pending outcome of the resolution mechanism provided under the Inter-governmental Relations Act. It is the practice of the Court to sustain grievances and cause of matters raised by the parties, unless they are is frivolous, vexatious and an abuse of the court process. In our view the matters raised in the petition are not so weak as to deprive them of a hearing on merit.

In light of the above, we echo our brothers in ***Kivanga Estates Limited vs. National Bank of Kenya Limited [2017] eKLR*** when they stated:

> ***"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations."***

We see no fault in the manner the learned Judges arrived at their determination.

In conclusion, it is inevitable that from the foregoing, the appeal and the cross-appeal cannot succeed based on what is placed before us. We affirm the High Court's jurisdiction as per its ruling made on 2nd November, 2018. In order to preserve judicial time and facilitate the expeditious disposal of the case, we dismiss the appeal and the cross appeal with the effect that the case should proceed for trial post-haste. Our decision by no means denies the appellant and cross appellants their legal arguments that can be advanced and considered on merits on the extent of the court's role towards perceived County and National Government functions as sought by the petitioners. The parties remain at liberty to advance any arguments at their disposal for consideration by the trial Judges on merit. We need not add that there remains the legal avenue by way of appeal in the event that any party feels aggrieved by the ultimate decision of the trial court. The costs of this appeal and cross appeal shall be borne by the appellant and cross appellants in equal measure.

Orders accordingly.

Dated and Delivered at Mombasa this 26th day of September, 2019.

.....

M. WARSAME

JUDGE OF APPEAL

.....

P. O. KIAGE

JUDGE OF APPEAL

.....

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR