



**Modern Holdings (E. A) Ltd v Kenya Ports Authority (Petition
20 of 2017) [2018] KESC 23 (KLR) (9 October 2018) (Ruling)**

Modern Holdings (E. A) Ltd v Kenya Ports Authority [2018] eKLR

Neutral citation: [2018] KESC 23 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 20 OF 2017

PM MWILU, DCJ & VP, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

OCTOBER 9, 2018

BETWEEN

MODERN HOLDINGS (E. A) LTD PETITIONER

AND

KENYA PORTS AUTHORITY RESPONDENT

(Being an appeal from the Judgment and Decree of the Court of Appeal in Civil Appeal No.108 Of 2016 at Mombasa (Hon. Justice Milton Asike Makhandia, Hon. Justice William Ouko, Hon. Justice Kathurima M’Inoti JJ. A) dated and delivered on the 29th day of September, 2017)

RULING

1. Upon perusing the Notice of Motion application dated 30th November 2017 and filed herein on 1st December 2017 pursuant to section 163(4)(b) of the Constitution, section 17 of the Supreme Court of Kenya Act and all other enabling provisions of the law where the applicant herein seeks orders that the petition of appeal dated 3rd November 2017 and filed on even date and the Record of Appeal be struck out; and that the cost of and incidental to the application be awarded to the Respondent; and
2. Upon reading the grounds on the face of the application, the applicant’s affidavit sworn on 1st December, 2017, the petitioner/respondent’s replying affidavit sworn on his own behalf and on behalf of the respondent and filed on 21st February 2018; and
3. Upon considering the written submissions on record for the applicant and the list of authorities therein, where the applicant contends that the appeal by the applicant to the court of appeal against the decision of the High Court was brought on several grounds, amongst them the High Court’s lack of jurisdiction under section 62 of the Kenya Ports Authority Act to entertain proceedings before it. The appeal was successful and parties allowed to proceed under the said provision of section 62 of the Kenya Ports Authority Act and that neither the proceedings before the High Court nor the Court of



Appeal involved the interpretation or application of the constitution as contemplated under Article 163(4)(a) of the Constitution; and that the appeal lies under the provisions of Article 163(4)(b) of the Constitution to which the petitioner has not sought leave for certification-that the appeal involved a matter of general public importance before it can be entertained by this Honorable Court.; and

4. Upon considering the respondent's written submissions on record and the list of authorities therein, the respondents oppose the application on grounds that indeed the Respondent/Applicant raised the issue of the High Court's jurisdiction for the first time at the Court of Appeal; and in answer to the question of jurisdiction the Petitioner raised the issue of the constitutionality of Section 62 of the KPA Act; that both Parties before the Court of Appeal extensively addressed the question of the constitutionality of Section 62 of the KPA Act in both written and oral submissions; that the Court of Appeal determined the issue of the constitutionality of Section 62 of the Kenya Ports Authority Act and it's that determination alone that disposed off the appeal; thus for the Court of Appeal to determine whether or not Section 62 of the KPA Act was constitutional, the court engaged in the interpretation and application of the Constitution.
5. And having considered the application, as the constitutionality of section 62 of the Kenya Ports Act was challenged, we find that our jurisdiction under Article 163(4)(a) was properly invoked. Consequently, we dismiss this application. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER, 2018.

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M.K IBRAHI

JUSTICE OF THE SUPREME COURT

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J.B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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S.N. NJOKI

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

