REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CIVIL APPEAL (APPLIC.) NO.E 12 OF 2021

KENYA PORTS AUTHORITY.....APPELLANT

VERSUS

WILLIAM ODHIAMBO RAMOGI.....1ST RESPONDENT
ASHA MASHAKA OMAR.....2ND RESPONDENT
GERALD LEWA KIT .....3RD RESPONDENT
KENYA TRANSPORTERS ASSOCIATION ..... 4TH RESPONDENT
THE ATTORNEY GENERAL .....5TH RESPONDENT
CABINET SECRETARY,
MINISTRY OF TRANSPORT & INFRASTRUCURE.....6TH RESPONDENT
KENYA RAILWAYS CORPORATION .....7TH RESPONDENT
COMPETITION AUTHORITY OF KENYA.....8TH RESPONDENT
MUSLIMS FOR HUMAN RIGHTS.....9TH RESPONDENT
MAINA KIAI .....10TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA.....11TH RESPONDENT

(Being an appeal from part of the Judgement and Decree of the High Court of Kenya at Mombasa (L. Achode, J. Ngugi, P. Nyamweya, E. Ogolla & A. Mrima JJ) dated 6th November 2020 in Mombasa Petition No. 159 of 2018 Consolidated with Petition No. 201 of 2019)

BETWEEN

WILLIAM ODHIAMBO RAMOGI & 3 OTHERS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL & 4 OTHERS .....RESPONDENTS

AND

MUSLIMS FOR HUMAN RIGHTS & 2 OTHERS.....INTERESTED PARTIES

NOTICE OF MOTION

Dated at **Mombasa** this 12th day of February 2021

MURIU MUNGAI & COMPANY LLP
ADVOCATES FOR THE APPELLANT

DRAWN & FILED BY:-
Muriu, Mungai & Company
Advocates
Mombasa Trade Centre (Ref: D2/KPA/001/021M)
3rd Floor, South Wing
P.O Box 90282–80100
Mombasa
Cell: 0722981412 Email: mmcmsa@mmcasafo.com

TO BE SERVED UPON:
Nyambura Kihoro
Advocate
Sea View Plaza, 2nd Floor
P.O. Box 490-80100
Mombasa

Attorney General
Social Security Building, 6th Floor
Mombasa

Miller & Company
Advocates
Sea View Plaza, 1st Floor
P.O. Box 90088-80100
Mombasa

Otieno Ogolla & Company
Advocates
Studio House, 3rd Floor
Marcus Garvey Road, Kilimani
P.O. Box 22871-00100
Nairobi

MMA Advocates LLP
Transnational Plaza,
9th Floor, Wing B
Opp. Supreme Court
P.O. Box 11223-00100
Nairobi

Gikandi & Company
Advocates
Sauti ya Kenya Road
P.O. Box 87669-80100
Mombasa

Cootow & Associates
Advocates
Social Security House,
North Tower, Penthouse
P.O. Box 16858 - 80100
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Dated at **Mombasa** this 12th day of February 2021

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ADVOCATES FOR THE APPELLANT

DRAWN & FILED BY:-
Muriu, Mungai & Company
Advocates
Mombasa Trade Centre (Ref: D2/KPA/001/021M)
3rd Floor, South Wing
P.O Box 90282–80100
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Studio House, 3rd Floor
Marcus Garvey Road, Kilimani
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Nairobi

MMA Advocates LLP
Transnational Plaza,
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9. **MUSLIMS FOR HUMAN RIGHTS**
10. **MAINA KIAI**
11. **COUNTY GOVERNMENT OF MOMBASA .....RESPONDENTS**

— 10

(Being an application for stay of execution pending appeal from part of the judgement and decree of the High Court of Kenya sitting at Mombasa (L. Achode, J. Ngugi, P. Nyamweya, E. Ogola & A. C. Mrima JJ) delivered on 6th November 2020 in Mombasa HC Petition No. 159 of 2018 consolidated with Petition No. 201 of 2019)

BETWEEN

WILLIAM ODHIAMBO RAMOGI & 3 OTHERS.....PETITIONERS —20

VERSUS

THE ATTORNEY GENERAL & 4 OTHERS.....RESPONDENTS

AND

MUSLIMS FOR HUMAN RIGHTS & 2 OTHERS.....INTERESTED PARTIES

CERTIFICATE IN SUPPORT OF URGENCY

I, **Kongere Billy** an advocate of the High Court of Kenya practicing in the firm of **Muriu Mungai & Company Advocates LLP** having conduct of the matter on the Appellant's behalf hereby certify it to be urgent meriting hearing forthwith for the following reasons;

1. The Appellant is aggrieved by part of the judgment of the Honorable Court delivered on 6th November 2020, quashing directives issued on 15th March 2019 and 3rd August 2019.

2. Even though the trial court, having appreciated the ramifications of that order, suspended the quashing order for 180 days, it is not possible to pursue the appeal to its logical conclusion before **the quashing order takes effect on 7th May 2021**.

3. The Appellant is therefore reasonably apprehensive that the quashing order will, at the lapse of 180 days, take effect. This will significantly disrupt the Appellant's operations and will result in substantial loss as detailed in the Motion filed herewith. —10

4. Unless this application is heard urgently and the prayers sought granted, it will be worthless and futile for the Appellant to pursue its appeal in the Court of Appeal.

5. The trial court on 5th February 2021 refused the Appellant's application for stay of execution principally on the ground that the Court of Appeal is better placed to entertain the application.

6. It is therefore in the interests of justice that the Court of Appeal hears the application and grants the orders sought.

Dated at Mombasa this 12th day of February 2021 —20

MURIU MUNGAI & COMPANY LLP
ADVOCATES FOR THE APPELLANT

DRAWN & FILED BY:-
Muriu, Mungai & Company
Advocates LLP
Mombasa Trade Centre
3rd Floor South Wing
P.O. Box 90282-80100
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Cell: 0722981412 Email: mmcmsa@mmcasafo.com

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BETWEEN

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VERSUS

THE ATTORNEY GENERAL & 4 OTHERS.....RESPONDENTS

AND

MUSLIMS FOR HUMAN RIGHTS & 2 OTHERS.....INTERESTED PARTIES

AFFIDAVIT IN SUPPORT OF URGENCY

I, **KONGERE BILLY** of Post Office Box Number 90282-80100 Mombasa residing and working for gain in Mombasa County within the republic of Kenya hereby make oath and state as follows;

1. **THAT** I am an advocate of the High Court of Kenya practicing as such in the firm of Muriu Mungai & Company Advocates LLP having conduct

of this matter on behalf of the Appellant hence competent to swear this affidavit.

2. **THAT** I am aware the 1st to 4th Respondents herein filed two separate petitions which were later consolidated. The two consolidated Petitions challenged various actions by the Appellant and the 5th to 8th Respondent herein, which were alleged to violate various provisions of the Constitution.

3. **THAT** vide a unanimous judgment delivered on 6th November 2020, the learned judges of the High Court dismissed most of the prayers in the consolidated Petitions. They however granted an order quashing the Appellant's directives issued on 15th March 2019 and 3rd August 2019.

4. **THAT** the learned judges suspended the order quashing the directives for a period of 180 days to enable the Appellant remedy the faults identified by the learned judges.

5. **THAT** the Appellant applied, vide a Notice of Motion dated 30th November 2020, for stay of execution of the order. However, that application was refused by the High Court on 5th February 2021 on the basis that the Court of Appeal is better placed to handle the application.

6. **THAT** the Appellant has now moved the Court of Appeal through the current Notice of Motion and Supporting Affidavit sworn by Turasha Kinyanjui on 11th February 2021. I have read both of those documents and understood their contents.

7. **THAT** having read the said affidavit, I am persuaded that this application and the intended appeal will be rendered nugatory unless the application is certified urgent and orders sought granted because;

   a. The directives were issued in the exercise of the Appellant's statutory power to manage and operates ports. Their quashing therefore will significantly disrupt the Appellant's management and operation of the port of Mombasa.

   b. The directives support the National Government's wider transport policy. Their nullification will disrupt the implementation of the transport policy starting from the port of Mombasa all the way to the ICD in Nairobi and Naivasha.

   c. The directives are meant to operationalize the Take or Pay Agreement which the court has upheld as valid. The Take or Pay Agreement is itself the tool through which the loan for the construction of the SGR is repaid. It will be difficult and improbable to meet the contractual obligations under the Take or Pay Agreement thus leading to default in the repayment obligations.

d. Public finances will be spent in complying with Order No. (d) of the judgment. It is imprudent to spend significant public financial resources in a process that the Court of Appeal may well find to have been unnecessary.

e. The 1st to 4th Respondents' financial means is unknown. It is doubtful that they are capable of refunding the significant financial resources that will be incurred in complying with Order No. (d) of the judgment.

8. **THAT** I therefore verily believe it to be in the interests of justice and fairness that the orders sought herein above be granted to protect the Applicant from the violation of its rights and the irredeemable loss it stands to suffer. —10

9. **THAT** what is stated hereinabove is true to the best of my knowledge, information and belief save for information whose sources I have disclosed and beliefs whose grounds I have stated.

Sworn at **Mombasa** by]

KONGERE BILLY]

This 12th day of [illegible] 2021] DEPONENT

BEFORE ME]

JUSTIN S. KABURU
ADVOCATE
COMMISSIONER FOR OATHS
& NOTARY PUBLIC
P. O. Box 792-80100, MSA-KENYA
ADMISSION No: P105/1451/85
PR/COR/2019/03722
Date:

COMMISSIONER FOR OATHS]

DRAWN & FILED BY:-
Muriu, Mungai & Company
Advocates LLP
Mombasa Trade Centre (Ref: D2/KPA/001/021M)
3rd Floor South Wing
P.O. Box 90282-80100
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Cell: 0722981412 Email: mmcmsa@mmcasafo.com

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BETWEEN

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VERSUS

THE ATTORNEY GENERAL & 4 OTHERS.....RESPONDENTS

AND

MUSLIMS FOR HUMAN RIGHTS & 2 OTHERS.....INTERESTED PARTIES

CERTIFICATE OF URGENCY

We, **Muriu Mungai & Company Advocates LLP** hereby certify this matter to be extremely urgent meriting hearing forthwith for the following reasons;

1. The Appellant is aggrieved by part of the judgment of the Honorable Court delivered on 6th November 2020, quashing directives issued on 15th March 2019 and 3rd August 2019.

2. Even though the trial court, having appreciated the ramifications of that order, suspended the quashing order for 180 days, it is not possible to pursue the appeal to its logical conclusion before **the quashing order takes effect on 7th May 2021.**

3. The Appellant is therefore reasonably apprehensive that the quashing order will, at the lapse of 180 days, take effect. This will significantly disrupt the Appellant's operations and will result in substantial loss as detailed in the Motion filed herewith.

4. Unless this application is heard urgently and the prayers sought granted, it will be worthless and futile for the Appellant to pursue its appeal in the Court of Appeal.

5. The trial court on 5th February 2021 refused the Appellant's application for stay of execution principally on the ground that the Court of Appeal is better placed to entertain the application.

6. It is therefore in the interests of justice that the Court of Appeal hears the application and grants the orders sought.

Dated at Mombasa this 12th day of February 2021

MURIU MUNGAI & COMPANY LLP
ADVOCATES FOR THE APPELLANT

DRAWN & FILED BY:-
Muriu, Mungai & Company
Advocates LLP
Mombasa Trade Centre
3rd Floor South Wing
P.O. Box 90282-80100
Mombasa
Cell: 0722981412 Email: mmcmsa@mmcasafo.com

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NOTICE OF MOTION

(Under section 3A & 3B of the Appellate Jurisdiction Act Cap 9 and Rule 5(2)(b) of the Court of Appeal Rules 2010)

TAKE NOTICE that the Honorable Court will be moved on the _____ day of _____ 2021 at 9:00 O'clock in the forenoon or soon thereafter so as counsel for the Appellant may be heard on an application for the following **ORDERS**:

1. The application be certified urgent and service be dispensed with in the first instance.

2. There be a stay of execution of Order No. (c) & (d) of the judgment of the High Court delivered on 6th November 2020 pending the hearing and determination of this application.

3. There be a stay of execution of Order No. (c) & (d) of the judgment of the High Court delivered on 6th November 2020 pending the hearing and determination of *Mombasa Court of Appeal Civil Appeal No. E12 of 2021*.

4. The costs of this application be in the appeal.

WHICH APPLICATION is premised on the following **GROUNDS**:

1. The 1st to 4th Respondents herein filed two separate petitions which were later consolidated. The two consolidated Petitions challenged various actions by the Appellant and the 5th to 8th Respondent herein, which were alleged to violate various provisions of the Constitution.

2. Vide a unanimous judgment delivered on 6th November 2020, the learned judges of the High Court dismissed most of the prayers in the consolidated Petitions. They however granted an order quashing the Appellant's directives issued on 15th March 2019 and 3rd August 2019 in the following words;

   The claim that the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed.

   Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.

3. The quashed directives operationalize not only the Take or Pay Agreement, which the learned judges upheld, but are also meant to ensure efficient and effective operations at the port of Mombasa.

4. The learned judges suspended the order quashing the directives for a period of 180 days to enable the Appellant remedy the faults identified by the learned judges.

5. The Appellant is aggrieved by the decision to quash the directives and has appealed to this Honorable Court.

6. The Appellant believes that the appeal is not frivolous but raises significant questions of law as set out in the Memorandum of Appeal dated 5th February 2021.

7. Even though the quashing has been suspended as aforesaid, the Appellant is apprehensive that it is not humanly possible, given the current circumstances, to prosecute and obtain judgment from the Court of Appeal within what is left of the 180 days.

8. Consequently, unless Order No. (c) and (d) are stayed as sought, they will automatically take effect on the 181st day, that is on 7th May 2021.

9. If the stay sought is not granted and the orders take effect, the appeal will be rendered nugatory. Additionally the Appellant, and the public at large, stand to suffer substantial loss as shown below;

   a. The directives were issued in the exercise of the Appellant's statutory power to manage and operates ports. Their quashing therefore will significantly disrupt the Appellant's management and operation of the port of Mombasa.

   b. The directives support the National Government's wider transport policy. Their nullification will disrupt the implementation of the transport policy starting from the port of Mombasa all the way to the ICD in Nairobi and Naivasha.

   c. The directives are meant to operationalize the Take or Pay Agreement which the court has upheld as valid. The Take or Pay Agreement is itself the tool through which the loan for the construction of the SGR is repaid. It will be difficult and improbable to meet the contractual obligations under the Take or Pay Agreement thus leading to default in the repayment obligations.

   a. Public finances will be spent in complying with Order No. (d) of the judgment. It is imprudent to spend significant public financial resources in a process that the Court of Appeal may well find to have been unnecessary.

   b. The 1st to 4th Respondents' financial means is unknown. It is very doubtful that they are capable of refunding the significant financial resources that will be incurred in complying with Order No. (d) of the judgment.

10. Given the circumstances, a stay of executions is merited and should be granted for the following reasons;

    a. The issues sought to be canvassed on appeal are novel, complex and of significant public importance. It is therefore desirable that before

the judgment of the High Court is implemented, those issues be resolved with finality by the appellate courts.

b. The discomfort, if any, that a stay order may bring to the 1st to 3rd Respondents is capable of monetary compensation. On the other hand, a refusal of the stay will mean that significant public funds will have been lost with no chance of recovery.

11. Bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes here, it is highly desirable that the court maintains the status quo currently prevailing to give the appellate court adequate opportunity to resolve the dispute.

12. The Appellant, vide a Notice of Motion dated 30th November 2020, approached the High Court to stay its own judgment. However, vide a ruling delivered on 5th February 2021, refused the application principally on the basis that the Court of Appeal is better placed to consider the application.

13. It is therefore in the interests of justice and fairness that the Court of Appeal considers the application and grants the orders sought.

AND WHICH APPLICATION is further supported by the annexed affidavit of **TURASHA J. KINYANJUI** and on such other and further grounds as may be adduced at the hearing hereof.

Dated at **Mombasa** this __**11th**___ day of ___**February**_____ 2021

MURIU MUNGAI & COMPANY LLP
ADVOCATES FOR THE APPELLANT

Lodged in the Court of Appeal Registry at Mombasa this 12th day of February 2021

DEPUTY REGISTRAR
COURT OF APPEAL AT MOMBASA

DRAWN & FILED BY:-
Muriu, Mungai & Company
Advocates LLP
Mombasa Trade Centre
3rd Floor South Wing
P.O. Box 90282-80100
Mombasa
Cell: 0722981412 Email: mmcmsa@mmcasafo.com

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MUSLIMS FOR HUMAN RIGHTS & 2 OTHERS.....INTERESTED PARTIES

SUPPORTING AFFIDAVIT

I, **TURASHA J. KINYANJUI** of P.O. Box 95009-80104 Mombasa residing and working for gain in Mombasa County within the republic of Kenya hereby make oath and state as follows;

1. **THAT** I am the 3rd Respondent's Head of Litigation and Disputes, fully conversant with matters giving rise to the present application. I have

been duly authorized to swear this affidavit on behalf of the 3rd Respondent.

2. **THAT** I am aware the 1st to 4th Respondents herein filed two separate petitions which were later consolidated. The two consolidated Petitions challenged various actions by the Appellant and the 5th to 8th Respondent herein, which were alleged to violate various provisions of the Constitution.

3. **THAT** vide a unanimous judgment delivered on 6th November 2020, the learned judges of the High Court dismissed most of the prayers in the consolidated Petitions. They however granted an order quashing the Appellant's directives issued on 15th March 2019 and 3rd August 2019 in the following words;

   The claim that the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed.

   Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.

4. **THAT** the quashed directives operationalize not only the Take or Pay Agreement, which the learned judges upheld, but are also meant to ensure efficient and effective operations at the port of Mombasa.

5. **THAT** the learned judges suspended the order quashing the directives for a period of 180 days to enable the Appellant remedy the faults identified by the learned judges.

6. **THAT** the Appellant is aggrieved by the decision to quash the directives and has appealed to this Honorable Court.

7. **THAT** the Appellant believes that the appeal is not frivolous but raises significant questions of law as set out in the Memorandum of Appeal dated 5th February 2021.

8. **THAT** even though the quashing has been suspended as aforesaid, the Appellant is apprehensive that it is not humanly possible, given the current circumstances, to lodge, prosecute and obtain judgment from the Court of Appeal within the 180 days.

9. **THAT** consequently, unless Order No. (c) and (d) are stayed, they will automatically take effect on the 181st day, that is on 7th May 2021.

10. **THAT** if the stay sought is not granted and the orders take effect, the appeal will be rendered nugatory. Additionally the Appellant, and the public at large, stand to suffer substantial loss as shown below;

    a. The directives were issued in the exercise of the Appellant's statutory power to manage and operates ports. Their quashing therefore will significantly disrupt the Appellant's management and operation of the port of Mombasa.

    b. The directives support the National Government's wider transport policy. Their nullification will disrupt the implementation of the transport policy starting from the port of Mombasa all the way to the ICD in Nairobi and Naivasha.

    c. The directives are meant to operationalize the Take or Pay Agreement which the court has upheld as valid. The Take or Pay Agreement is itself the tool through which the loan for the construction of the SGR is repaid. It will be difficult and improbable to meet the contractual obligations under the Take or Pay Agreement thus leading to default in the repayment obligations.

    c. Public finances will be spent in complying with Order No. (d) of the judgment. It is imprudent to spend significant public financial resources in a process that the Court of Appeal may well find to have been unnecessary.

    d. The 1st to 4th Respondents' financial means is unknown. It is doubtful that they are capable of refunding the significant financial resources that will be incurred in complying with Order No. (d) of the judgment.

11. **THAT** given the circumstances, I verily believe that a stay of execution is merited and should be granted for the following reasons;

    a. The issues sought to be canvassed on appeal are novel, complex and of significant public importance. It is therefore desirable that before the judgment of the High Court is implemented, those issues be resolved with finality by the appellate courts.

    b. The discomfort, if any, that a stay order may bring to the 1st to 3rd Respondents is capable of monetary compensation. On the other hand, a refusal of the stay will mean that significant public funds will have been lost with no chance of recovery.

12. **THAT** bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the

relevant causes here, it is highly desirable that the court maintains the status quo currently prevailing to give the appellate court adequate opportunity to resolve the dispute.

13. **THAT** the Appellant, vide a Notice of Motion dated 30th November 2020, approached the High Court to stay its own judgment (I annex and mark as **JT-1** a copy of the Notice of Motion dated 30th November 2020 excluding its annexures).

14. **THAT** however, vide a ruling delivered on 5th February 2021, refused the application principally on the basis that the Court of Appeal is better placed to consider the application (I annex and mark as **JT-2** a copy of the ruling delivered on 5th February 2021).

15. **THAT** it is therefore in the interests of justice and fairness that the Court of Appeal considers the application and grants the orders sought.

16. **THAT** what is stated hereinabove is true to the best of my knowledge, information and belief save for information whose sources I have disclosed and beliefs whose grounds I have stated.

Sworn at **Mombasa** by]

TURASHA J. KINYANJUI] _____

This 12th day of February 2021] DEPONENT

BEFORE ME]

]

COMMISSIONER FOR OATHS]

YASSIN S. KABURU
ADVOCATE
COMMISSIONER FOR OATHS
& NOTARY PUBLIC
P. O. Box 792-80100 MSA-KENYA
ADMISSION No: P105/1451/85
PRACTICING CERT. NO. ...2019/03722

DRAWN & FILED BY:-
Muriu, Mungai & Co.
Advocates LLP
Mombasa Trade Centre (Ref: D2/KPA/006/018M)
3rd Floor South Wing
P.O. Box 90282-80100
Mombasa
Cell: 0722981412 Email: mmcmsa@mmcasafo.com

TO BE SERVED UPON:
Nyambura Kihoro
Advocate
Sea View Plaza, 2nd Floor
P.O. Box 490-80100
Mombasa

Attorney General
Social Security Building, 6th Floor
Mombasa

Miller & Company
Advocates
Sea View Plaza, 1st Floor
P.O. Box 90088-80100
Mombasa

Otieno Ogolla & Company
Advocates
Studio House, 3rd Floor
Marcus Garvey Road, Kilimani
P.O. Box 22871-00100
Nairobi

MMA Advocates LLP
Transnational Plaza,
9th Floor, Wing B
Opp. Supreme Court
P.O. Box 11223-00100
Nairobi

Gikandi & Company
Advocates
Sauti ya Kenya Road
P.O. Box 87669-80100
Mombasa

Cootow & Associates
Advocates
Social Security House,
North Tower, Penthouse
P.O. Box 16858 - 80100
Mombasa

19

This is the Exhibit Marked "ST-1" referred to in the annexed Declaration Of Affidavit TUASHA. J. OMWENJU

Declared Sworn before me this 12TH day of FEB 2021 In the Republic of Kenya

Commissioner for Oaths

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 159 OF 2018

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 201 OF 2018

HIGH COURT OF KENYA
CONSTITUTIONAL AND
JUDICIAL REVIEW DIVISION
01 DEC 2020
MOMBASA
RECEIVED

1. WILLIAM ODHIAMBO RAMOGI
2. ASHA MASHAKA OMAR
3. GERALD LEWA KITI
4. KENYA TRANSPORTERS ASSOCIATION.....PETITIONERS

10

VERSUS

1. THE ATTORNEY GENERAL
2. CABINET SECRETARY,
MINISTRY OF TRANSPORT & INFRASTRUCTURE
3. KENYA PORTS AUTHORITY
4. KENYA RAILWAYS CORPORATION
5. COMPETITION AUTHORITY OF KENYA.....RESPONDENTS

AND

1. MUSLIMS FOR HUMAN RIGHTS
2. MAINA KIAI
3. COUNTY GOVERNMENT OF MOMBASA.....INTERESTED PARTIES

20

CERTIFICATE OF URGENCY

We, **Muriu Mungai & Company Advocates LLP** hereby certify this matter to be extremely urgent meriting hearing forthwith for the following reasons;

1. The 3rd Respondent is aggrieved by part of the judgment of the Honorable Court delivered on 6th November 2020, quashing directives issued on 15th March 2019 and 3rd August 2019.

2. The 3rd Respondent has, upon extensive consultations, filed a Notice of Appeal dated 16th November 2020 evincing its intention to appeal to the Court of Appeal.

3. Even though the Honorable Court suspended the quashing order for 180 days, it is not possible to pursue the appeal to its logical conclusion before the quashing order takes effect.

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4. The 3rd Respondent is therefore reasonably apprehensive that the quashing order will, at the lapse of 180 days, take effect. This will significantly disrupt the 3rd Respondent's operations and will result in substantial loss as detailed in the Motion filed herewith.

5. Unless this application is heard urgently and the prayers sought granted, it will be worthless and futile for the 3rd Respondent to pursue its intended appeal in the Court of Appeal.

6. It is in the interests of justice that the orders sought here are granted.

Dated at Mombasa this 1st day of December 2020

MURIU MUNGAI & COMPANY LLP
ADVOCATES FOR THE 3RD RESPONDENTS

-10

DRAWN & FILED BY:-
Muriu, Mungai & Co.
Advocates LLP
Mombasa Trade Centre
3rd Floor South Wing
P.O. Box 90282-80100
Mombasa
Cell: 0722981412 Email: mmcmsa@mmcasafo.com

(Ref: D2/KPA/006/018M)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 159 OF 2018

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 201 OF 2019

1. WILLIAM ODHIAMBO RAMOGI
2. ASHA MASHAKA OMAR
3. GERALD LEWA KITI
4. KENYA TRANSPORTERS ASSOCIATION.....PETITIONERS

VERSUS

1. THE ATTORNEY GENERAL
2. CABINET SECRETARY,
MINISTRY OF TRANSPORT & INFRASTRUCTURE
3. KENYA PORTS AUTHORITY
4. KENYA RAILWAYS CORPORATION
5. COMPETITION AUTHORITY OF KENYA.....RESPONDENTS

AND

1. MUSLIMS FOR HUMAN RIGHTS
2. MAINA KIAI
3. COUNTY GOVERNMENT OF MOMBASA.....INTERESTED PARTIES

NOTICE OF MOTION

(Under rule 3(5) & (8) and rule 32(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and section 1A, 1B, 3, & 3A of the Civil Procedure Act Cap 21)

TAKE NOTICE that the Honorable Court will be moved on the 10TH day of December 2020 at 9:00 O'clock in the forenoon or soon thereafter so as counsel for the 3rd Respondent/Applicant may be heard on an application for the following **ORDERS:**

1. The application be certified urgent and service be dispensed with in the first instance.

2. There be a stay of execution of Order No. (c) & (d) of the judgment delivered on 6th November 2020 pending the hearing and determination of this application.

3. There be a stay of execution of Order No. (c) & (d) of the judgment delivered on 6th November 2020 pending the lodging, hearing and determination of an intended appeal to the Court of Appeal.

4. The costs of this application be in the intended appeal.

WHICH APPLICATION is premised on the following **GROUNDS**:

1. The two consolidated Petitions challenged various actions by the Respondents which were alleged to violate various provisions of the Constitution.

2. Vide a unanimous judgment delivered on 6th November 2020, the learned judges dismissed several of the prayers in the consolidated Petitions. They however granted an order quashing the 3rd Respondent's directives issued on 15th March 2019 and 3rd August 2019 in the following words;

   The claim that the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed.

   Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.

3. The quashed directives operationalize not only the Take or Pay Agreement, which the learned judges upheld, but are also meant to ensure efficient and effective operations at the port of Mombasa.

4. The learned judges suspended the order quashing the directives for a period of 180 days to enable the 3rd Respondent remedy the faults identified by the learned judges.

5. The 3rd Respondent is aggrieved by the decision to quash the directives and has evinced its intention to appeal by filing the Notice of Appeal dated 16th November 2020.

6. The 3rd Respondent believes that the intended appeal is not frivolous but raises significant questions of law to wit;

a. What is the threshold for operational decisions that call for public participation?

b. Did the learned judges properly appreciate and apply that threshold in finding that the impugned directives required public participation?

7. Even though the quashing has been suspended as aforesaid, the 3rd Respondent is apprehensive that it is not humanly possible, given the current circumstances to lodge, prosecute and obtain judgment from the Court of Appeal within the 180 days.

8. Consequently, unless Order No. (c) and (d) are stayed as sought, they will automatically take effect on the 181st day. —10

9. If the stay sought is not granted and the orders take effect, the 3rd Respondent, and the public at large, stand to suffer substantial loss as shown below;

a. The directives were issued in the exercise of the 3rd Respondent's statutory power to manage and operates ports. Their quashing therefore will significantly disrupt the 3rd Respondent's management and operation of the port of Mombasa.

b. The directives support the National Government's wider transport policy. Their nullification will disrupt the implementation of the transport policy starting from the port of Mombasa all the way to the ICD in Nairobi and Naivasha. —20

c. The directives are meant to operationalize the Take or Pay Agreement which the court has upheld as valid. The Take or Pay Agreement is itself the tool through which the loan for the construction of the SGR is repaid. It will be difficult and improbable to meet the contractual obligations under the Take or Pay Agreement thus leading to default in the repayment obligations.

c. Public finances will be spent in complying with Order No. (d) of the judgment. It is imprudent to spend significant public financial resources in a process that the appellate court may well find to have been unnecessary. —30

d. The Petitioners' means of income is unknown. It is very doubtful that they are capable of refunding the significant financial resources that will be incurred in complying with Order No. (d) of the judgment.

10. Given the circumstances, there is no overwhelming hindrance t granting the stay of execution sought. If anything, the facts show that a stay should be granted for the following reasons;

    a. The issues raised in the Petitions are novel, complex and of significant public importance. It is therefore desirable that before the judgment is implemented, those issues be resolved with finality by the courts higher up the hierarchy.

    b. The discomfort that the Petitioners will suffer as a result of a stay is capable of monetary compensation. On the other hand, significant public funds will have been lost with no chance of recovery.

11. Bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes here, it is highly desirable that the court maintains the status quo currently prevailing to give the appellate court adequate opportunity to resolve the dispute.

12. The time taken to lodge this application was necessitated by the need to obtain internal approvals after consultations between the 3rd Respondent and its parent Ministry, the 2nd Respondent herein. There is therefore no unreasonable delay, in the circumstances, in bringing the present application.

13. It is in the interests of justice and fairness that the application be allowed as sought.

AND WHICH APPLICATION is further supported by the annexed affidavit of **TURASHA J. KINYANJUI** and on such other and further grounds as may be adduced at the hearing hereof.

Dated at **Mombasa** this **30th** day of **November** 2020

MURIU MUNGAI & COMPANY LLP
ADVOCATES FOR THE 3RD RESPONDENT

DRAWN & FILED BY:
Muriu, Mungai & Co.
Advocates LLP
Mombasa Trade Centre
3rd Floor South Wing
P.O. Box 90282-80100
Mombasa
Cell: 0722981412 Email: mmcmsa@mmcasafo.com

(Ref: D2/KPA/006/018M)

TO BE SERVED UPON:

Nyambura Kihoro
Advocate
Sea View Plaza, 2nd Floor
P.O. Box 490-80100
Mombasa

Attorney General
Social Security Building, 6th Floor
Mombasa

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Advocates
Sea View Plaza, 1st Floor
P.O. Box 90088-80100
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Advocates
Studio House, 3rd Floor
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P.O. Box 22871-00100
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 159 OF 2018

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 201 OF 2019

1. WILLIAM ODHIAMBO RAMOGI
2. ASHA MASHAKA OMAR
3. GERALD LEWA KITI
4. KENYA TRANSPORTERS ASSOCIATION.....PETITIONERS

VERSUS

1. THE ATTORNEY GENERAL
2. CABINET SECRETARY,
MINISTRY OF TRANSPORT & INFRASTRUCTURE
3. KENYA PORTS AUTHORITY
4. KENYA RAILWAYS CORPORATION
5. COMPETITION AUTHORITY OF KENYA.....RESPONDENTS

AND

1. MUSLIMS FOR HUMAN RIGHTS
2. MAINA KIAI
3. COUNTY GOVERNMENT OF MOMBASA.....INTERESTED PARTIES

SUPPORTING AFFIDAVIT

I, **TURASHA J. KINYANJUI** of P.O. Box 95009-80104 Mombasa residing and working for gain in Mombasa County within the republic of Kenya hereby make oath and state as follows;

1. **THAT** I am the 3rd Respondent's Head of Litigation and Disputes, fully conversant with matters giving rise to the present application. I have been duly authorized to swear this affidavit on behalf of the 3rd Respondent.

2. **THAT** I am aware the two consolidated Petitions challenged various actions by the Respondents which were alleged to violate various provisions of the Constitution.

3. **THAT** vide a unanimous judgment delivered on 6th November 2020, the learned judges dismissed several of the prayers in the consolidated Petitions. They however granted an order quashing the 3rd Respondent's directives issued on 15th March 2019 and 3rd August 2019 in the following words;

   The claim that the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed.

   Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.

   (I annex and mark as **TK-1** a copy of the judgment delivered on 6th November 2020)

4. **THAT** the quashed directives operationalize not only the Take or Pay Agreement, which the learned judges upheld, but are also meant to ensure efficient and effective operations at the port of Mombasa.

5. **THAT** I note the learned judges suspended the order quashing the directives for a period of 180 days to enable the 3rd Respondent remedy the faults identified by the learned judges.

6. **THAT** the 3rd Respondent is aggrieved by the decision to quash the directives and has evinced its intention to appeal by filing the Notice of Appeal dated 16th November 2020 (I annex and mark as **TK-2** a copy of the Notice of Appeal dated 16th November 2020).

7. **THAT** I am informed by the 3rd Respondent's counsel that the intended appeal is not frivolous but raises significant questions of law to wit;

   a. What is the threshold for operational decisions that call for public participation?

   b. Did the learned judges properly appreciate and apply that threshold in finding that the impugned directives required public participation?

8. **THAT** even though the quashing has been suspended as aforesaid, I am informed by the 3rd Respondent's counsel that it is not humanly possible,

given the current circumstances to lodge, prosecute and obtain judgment from the Court of Appeal within the 180 days.

9. **THAT** consequently, unless Order No. (c) and (d) are stayed as sought, they will automatically take effect on the 181st day.

10. **THAT** if the stay sought is not granted and the orders take effect, the 3rd Respondent, and the public at large, stand to suffer substantial loss as shown below;

    a. The directives were issued in exercise of the 3rd Respondent's statutory power to manage and operates ports. Their quashing therefore will significantly disrupt the 3rd Respondent's management and operation of the port of Mombasa.

    b. The directives support the National Government's wider transport policy. Their nullification will disrupt the implementation of the transport policy starting from the port of Mombasa all the way to the ICD in Nairobi and Naivasha.

    c. The directives are meant to operationalize the Take or Pay Agreement which the court has upheld as valid. The Take or Pay Agreement is itself the tool through which the loan for the construction of the SGR is repaid. It will be difficult and improbable to meet the contractual obligations under the Take or Pay Agreement thus leading to default in the repayment obligations.

    d. Public finances will be spent in complying with Order No. (d) of the judgment. It is imprudent to spend significant public financial resources in a process that the appellate court may well find to have been unnecessary.

    e. The Petitioners' means of income is unknown. It is very doubtful that they are capable of refunding the significant financial resources that will be incurred in complying with Order No. (d) of the judgment.

11. **THAT** given the circumstances, I verily believe that there is no overwhelming hindrance to granting the stay of execution sought. If anything, the facts show that a stay should be granted for the following reasons;

    a. The issues raised in the Petitions are novel, complex and of significant public importance. It is therefore desirable that before the judgment is implemented, those issues be resolved with finality by the courts higher up the hierarchy.

b. The discomfort that the Petitioners will suffer as a result of a stay is capable of monetary compensation. On the other hand, significant public funds will have been lost, if the judgment is executed, with no chance of recovery.

12. **THAT** I verily believe that bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes here, it is highly desirable that the court maintains the status quo currently prevailing to give the appellate court adequate opportunity to resolve the dispute.

13. **THAT** the 3rd Respondent's counsel inform me that they will take all steps to ensure that the Record of Appeal is lodged within forty five (45) days and thereafter request the Court of Appeal for a hearing on a priority basis. This, the 3rd Respondent believes, will strike a fair balance between the two competing interests.

14. **THAT** the time taken to lodge this application was necessitated by the need to obtain internal approvals after consultations between the 3rd Respondent and its parent Ministry, the 2nd Respondent herein. There is therefore no unreasonable delay, in the circumstances, in bringing the present application.

15. **THAT** what is stated hereinabove is true to the best of my knowledge, information and belief save for information whose sources I have disclosed and beliefs whose grounds I have stated.

Sworn at **Mombasa** by]

TURASHA J. KINYANJUI]

This 1st day of December 2020]

BEFORE ME]

]

COMMISSIONER FOR OATHS]

DEPONENT

DRAWN & FILED BY:-
Muriu, Mungai & Co.
Advocates LLP
Mombasa Trade Centre
3rd Floor South Wing
P.O. Box 90282-80100
Mombasa
Cell: 0722981412 Email: mmcmsa@mmcasafo.com

(Ref: D2/KPA/006/018M)

TO BE SERVED UPON:

Nyambura Kihoro
Advocate
Sea View Plaza, 2nd Floor
P.O. Box 490-80100
Mombasa

Attorney General
Social Security Building, 6th Floor
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P.O. Box 87669-80100
Mombasa

Cootow & Associates
Advocates
Social Security House,
North Tower, Penthouse
P.O. Box 16858 - 80100
Mombasa

31

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 159 OF 2018

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 201 OF 2019

WILLIAM ODHIAMBO RAMOGI.....1ST PETITIONER
ASHA MASHAKA OMAR.....2ND PETITIONER
GERALD LEWA KITI.....3RD PETITIONER
KENYA TRANSPORTERS ASSOCIATION LIMITED.....4TH PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT
THE CABINET SECRETARY, MINISTRY OF TRANSPORT AND INFRASTRACTURE.....2ND RESPONDENT
KENYA PORTS AUTHORITY.....3RD RESPONDENT
KENYA RAILWAYS CORPORATION.....4TH RESPONDENT
COMPETITION AUTHORITY OF KENYA.....5TH RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS.....1ST INTERESTED PARTY
MAINA KIAI.....2ND INTERESTED PARTY
COUNTY GOVERNMENT OF MOMBASA.....3RD INTERESTED PARTY

RULING

1. By a Notice of Motion Application herein dated 30/11/2020 the 3rd Respondent, Kenya Ports Authority (hereinafter, the Applicant), prays for the following orders:

This is the Exhibit Marked"..JT-2.. referred to in the annexed Declaration/Affidavit Of JUBASHA J. KICHANJI Declared/Sworn before me this..12TH..day of FEB.....2021.....in the Republic of Kenya

.....
Commissioner for Oaths

i. *The application be certified urgent and service be dispensed with in the first instance.*

ii. *There be a stay of execution of Order No. (c) and (d) of the Judgment delivered on 6/11/2020 pending the hearing and determination of this application.*

iii. *There be a stay of execution of Order No. (c) and (d) of the Judgment delivered on 6/11/2020 pending the lodging, hearing and determination of an intended appeal to the Court of Appeal.*

2. The Application is premised on grounds set out therein, and is supported by the affidavit of Turusha J. Kinyanjui sworn on 01/12/2020.

3. The Application was heard on 02/02/2021 through oral submissions. Professor Githu Muigai, SC, led Mr. Kongere for the Applicant. Mr. Gikandi, Learned Counsel submitted for the 4th Petitioner/Respondent. Mr. Ochieng, learned Counsel for the 3rd Interested Party did not submit on the matter. He left the matter for Court's consideration.

4. The Applicant's case is that the two consolidated Petitions challenged various actions by the Respondents which were alleged to violate various provisions of the Constitution; that *vide* a unanimous judgment delivered on 06/11/2020, the Learned Judges dismissed several of the prayers in the Consolidated Petitions. The Judges, however granted an order quashing the Applicant's directives issued on 15/03/2019 and 03/08/2019 in the following terms:

"the claim that the directives by the 3rd Respondent dated 15/3/2019 and 3/8/2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed; given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.

5. The Applicant contends that the quashed directives operationalize not only the Take or Pay Agreement, which the Learned Judges otherwise upheld, but are also meant to ensure efficient and effective operations at the port of Mombasa. They state that while the Learned Judges suspended the order quashing the directives for a period of 180 days to enable the Applicant to remedy the faults in process identified by the Learned Judges, the Applicant is aggrieved by the decision to quash the directives and has evinced its intention to appeal by filing the Notice of Appeal dated 16/11/2020. The Applicant believes that the intended appeal is not frivolous but raises significant questions of law to wit:

a) What the threshold for "operational decisions" of Government agencies and parastatals to trigger the duty for public participation is.

b) Whether the Learned Judges properly appreciated and applied the correct threshold in finding that the Impugned Directives required public participation.

6. Even though the Court suspended the operation of its order quashing the Impugned Directives for 180 days as aforesaid, the Applicant is apprehensive that it is not possible, given the current circumstances to lodge, prosecute and obtain judgment from the Court of Appeal within the 180 days. Consequently, the Applicant contends, unless Order No. (c) and (d) are stayed as sought, they will automatically take effect on the 181st day, and so if the stay sought is not granted and the orders take effect, the Applicant, and the public at large, would stand to suffer substantial loss. The Applicant argues that the following are the losses which it is likely to suffer if stay is not granted:

i. First, the Applicant argues that the directives were issued in the exercise of its statutory power to manage and operates ports. The quashing of the Impugned Directives, it argues, will therefore significantly disrupt the Applicant's management and operation of the port of Mombasa.

ii. Second, the Applicant contends that the Impugned Directives support the National Government's wider transport policy. Their nullification, therefore, will disrupt the implementation of the transport policy

starting from the port of Mombasa all the way to the ICD in Nairobi and Naivasha. 35

iii. Third, the Applicant posits that the directives are meant to operationalize the Take or Pay Agreement which the Court has upheld as valid. The Take or Pay Agreement is itself the tool through which the loan for the construction of the SGR is repaid. If stay is not granted and the quashing of the Impugned Directives take effect, it would be difficult and improbable for the Government to meet the contractual obligations under the Take or Pay Agreement thus leading to default in the repayment obligations. 10

iv. Fourth, the Applicant argues that public finances would be spent in complying with Order No. (d) of the judgment. It would be imprudent, the Applicant argues, to spend significant public financial resources in a process that the appellate court may well find to have been unnecessary.

v. Fifth, the Applicant argues that the Petitioners' means of income is unknown and that it is very doubtful that they would be capable of refunding the significant financial resources that would be incurred in complying with Order No. (d) of the judgment. 20

7. Additionally, the Applicant argues that given the circumstances, there is no overwhelming hindrance to granting

the stay of execution sought. If anything, the Applicant argues that there are exceptional grounds militating in favour of granting the stay as requested. They point out the following two reasons:

a) That the issues raised in the Petitions are novel, complex and of significant public importance. It is therefore desirable, the Applicant argues, that before the judgment is implemented, those issues be resolved with finality by the courts higher up the hierarchy.

b) The discomfort that the Petitioners will suffer as a result of a stay is capable of monetary compensation. On the other hand, significant public funds will have been lost with no chance of recovery.

8. The Applicant posits that bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes here, it is highly desirable that the court maintains the status quo currently prevailing to give the appellate court adequate opportunity to resolve the dispute.

9. The Applicant avers that the time taken to lodge this application was necessitated by the need to obtain internal approvals after consultations between the 3rd Respondent and its parent Ministry, the 2nd Respondent herein. There is therefore, they argue, no unreasonable delay, in the circumstances, in bringing the present application and it is in the interests of justice and fairness that the application be allowed as sought.

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10. Mr. Kongere cited four authorities in support of the Application. They are: ***George Kithi v Director of Public Prosecutions & 2 Others [2019] eKLR***; ***Raiply Woods (K) Ltd & Another v County Government of Baringo & 2 Others [2017] eKLR***; ***Maya Enterprises Limited v Kenya Revenue Authority & 2 Others [2020] eKLR***; and ***Joaninah Wanjiku Maina v County Government of Nairobi & 3 Others [2018] eKLR***. The legal thread in those authorities is that stay will be given should there be threat of irreparable loss or damage to the suit subject matter. The legal principle emerging from this case is encapsuled in the following paragraph in ***Combi (Singapore) Pte Limited v Ramnah Sriram & Another [1997] EWCA 2164*** which is cited with approval in the ***George Kithi Case (Supra)***:

> *In my judgment, the proper approach must be to make that order which best accords with the interests of justice. If there is a risk that irremediable harm may be caused to the Plaintiff if a stay is ordered but no similar detriment to the Defendant. If it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the Defendant if stay is not ordered, then a stay should normally be ordered. This assumes of course that the Court concludes that there may be some merit in the appeal. If it does not show no stay of execution should be ordered. But where there is a....of harm to one party or another, whichever order is made, the Court has to balance the alternatives in order to decide which of them is less likely to produce injustice.*

11. Only the 4th Petitioner – **Kenya Transporters Association** - filed a response to the Application. The 4th Petitioner filed Grounds of Opposition dated 21/1/2021, and a Replying Affidavit sworn by **Denis Okumu Ombok** on 21/1/2021.

12. The 4th Petitioner strongly opposes the Application. It is their argument that Judgment was delivered on 06/11/2020 and that it is now over seventy (70) days since the said Judgment was delivered. The 4th Petitioner points out that there is absolutely nothing tangible which the Applicant has presented before the court to show that the Applicant has diligently followed up on the typing and certifying of the proceedings herein, so that they can proceed with their intended appeal. The 4th Petitioner avers that in the Judgement delivered herein, the directive issued by the 2nd and 3rd Respondents in favour of the 4th Respondent with regard to the movement of containers from the Port of Mombasa to Nairobi was declared as unconstitutional. The Court granted the said Respondents a period of one hundred and eighty days (180) days so as to reorganize themselves to regularize the situation. The 4th Petitioner states that it is therefore unreasonable for the same Respondent to come back to court to ask for an extension of the said period.

13. The 4th Petitioner states that justice has to be served to all the parties equally, and any attempt by the Court to extend the said period will be perceived by the petitioners as though the Court is unduly favouring the said Respondents. The 4th Petitioner states that in any event it must also be appreciated that as matters now stand, the said decision by the Respondents has

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been declared null and void for all purposes. Therefore, to extend the period by a further period of more than 180 days, for the said Respondents to continue propagating a nullity of a situation, has serious ramifications where the Court may then appear to be acting contrary to the principles set out in Articles 10 and 47 of The Constitution. Such an appearance would be highly problematic seen from the optics of all parties being equal before the law; and that the Applicant should not be allowed to gain any more favourable orders from this court.

14. The 4th Petitioner states that the Applicant should have filed its record of appeal diligently and approached the Court of Appeal for an order to prioritize the appeal for early hearing. The 4th Petitioner states that its members are experiencing economic hardship which should not be allowed to continue any further. In the circumstance, the interest of the 4th Petitioner should also be taken into account as the members of the 4th Petitioner have been shortchanged ever since the said directives were put in place for a period which is now nearly two years.

15. The 4th Petitioner avers that the terms of the Judgement should be carried through since if the Applicant wins the appeal it would be easy to restart the movement of the containers in terms of the said directives. On the contrary the losses the members of the 4th Petitioner are suffering as a result of the execution of the said directives, are not losses that are capable of easy quantification. The 4th Petitioner states that the application herein is meant to punish and frustrate the members of the 4th Petitioner even more. It is also meant to give the Applicant and the 4th Respondent an undue advantage to

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make huge profits by suppressing the economic rights of their competitors. That is something that should never happen in a democratic society which ought to give equal opportunities to its citizens.

16. The 4th Petitioner further avers that in the Judgment delivered herein on 06/11/2020, the directives by the 3rd Respondent dated 15/03/2019 and 03/08/2019 were quashed and declared unconstitutional. Therefore, the Applicant's application to extend the effect of the said directives should not be entertained as nothing can ever stand on a nullity. The 4th Petitioner placed reliance on ***Benjamin Leonard McFoy v United Africa Company Limited, Appeal No. 67 of 1960*** that being so, the 4th Petitioner avers that the application made herein can only be made in the Court of Appeal as the trial court is already *functus officio* as it granted an order suspending the effect of the aforesaid directives and having declared them unconstitutional. As such, this court does not have jurisdiction to grant the orders sought as that jurisdiction has already been spent.

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17. In our considered view, the sole issue for determination herein is whether or not, in the circumstances of this case, and in the light of the orders we issued on 06/11/2020, the prayers for stay of execution sought herein should issue.

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18. The current Application arises from the orders we issued in the Judgment herein on 06/11/2020. The orders issued were as follows:

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a) Claims that the Take or Pay Agreement dated 30th September, 2014 and/or the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 violated the social and economic rights of the Petitioners were not proved and are hereby dismissed.

b) The claim that the Take or Pay Agreement dated 30th September, 2014 was in violation of Articles 10 and 47 of the Constitution failed and is hereby dismissed.

c) The claim that the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed.

d) Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.

e) All the other prayers in the Consolidated Petitions fail and are hereby dismissed.

f)This being a public interest litigation, each party will bear its own costs.

19. The Applicant now urges this court to stay orders (c) and (d), which will take effect on the 181st day from the date of

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Judgment. The Application before the court is brought under Rule 3(5) & (8) and Rule 32(3) of the *Constitution of Kenya (Protection of Rights and Fundamental freedom) Practice and Procedure Rules, 2013 (Mutunga Rules)* and Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21.

20. Rule 3(8) of the Mutunga Rules aforesaid states:

> *Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.*

21. The Application is also leveraged on overriding objectives of the Civil Procedure Code. We note the Applicant has grounded its application on the inherent powers of the Court stipulated in Rule 3(8) of the Mutunga Rules and the overriding objectives of the Civil Procedure Code. However, where there are specific provisions in law under which an Applicant should ground their Application, they should do so and not rely on the inherent powers of the Court or the overriding objectives of the Civil Procedure Code. In the present case, the appropriate provisions of the law which govern the grant of stay of execution pending appeal is Order 42, Rule 6 of the Civil Procedure Rules. The Rule provides as follows:

> *(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution*

of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

i. *The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

ii. *Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

22. In our view, the orders we granted herein were deliberate and advertent to cater for the circumstances contemplated in Order 42, Rule 6. The order of suspension acknowledged and catered for the circumstances provided in Order 42, Rule 6 for all the parties. It took into account the peculiar circumstances of the Applicant as a statutory body. Order No. (d) of our Judgment aforesaid was very deliberate. It acknowledged the difficult

conditions and circumstances that the Applicant will face in order to make the desired changes mandated in our aforesaid Judgment. In our view the stay of 180 days which was granted was adequate to enable the Applicant, if it wished to comply with the said orders, to do so. However, the Applicant has a constitutional right of appeal, and it has indeed filed a Notice of Appeal in the Court of Appeal. The Applicant has not placed anything before this court about what it has already done with the 90 days which have since lapsed. There are no mitigating circumstances brought to the attention of this court militating against the Applicant in the employment of the 90 days already gone. However, there is still 90 days remaining. That is adequate time for the Applicant to either appeal against the Judgment of this court, or to move the Court of Appeal for stay of execution.

23. Having granted a functional stay of execution for 180 days, the Applicant should obtain any further extension of the stay or its variation at the Court of Appeal which is better placed to determine its own docket and its timelines for the completion of the filed Appeal. The Court of Appeal may also be better placed, if so minded, to condition any stay granted on the Applicant meeting certain deadlines.

24. Even in terms of satisfying the ends of justice we are satisfied that nothing has been placed before us to warrant the interference with the orders we issued in the Judgment under reference.

25. **In the upshot, we find the Notice of Motion before the Court dated 30/11/2020 lacking in merit. The same is dismissed with costs to the 4th Petitioner/Respondent.**

26. Orders accordingly.

Dated, Signed and Delivered at Mombasa this 5th day of February, 2021.

HON. L. ACHODE
JUDGE

HON. J. NGUGI
JUDGE

HON. P. NYAMWEYA
JUDGE

HON. E. OGOLA
JUDGE

HON. A. MRIMA
JUDGE

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NOTE: This Ruling was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.