REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 82 OF 2019

IN THE MATTER OF: THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER: OF: ARTICLES 1, 2, 12, 10, 19, 21, 22, 23, 27, 35, 40, 43, 46, 47, 54, 55, 56, 57, 118, 174, 201, 227, 232 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE MERCHANT SHIPPING ACT NO. 4 OF 2009; THE KENYA PORTS AUTHORITY ACT, CHAPTER 391 OF THE LAWS OF KENYA; THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2019

BETWEEN

1. THE DOCK WORKERS UNION

2. TAIRENI ASSOCIATION OF MIJIKENDA

3. MUSLIMS FOR HUMAN RIGHTS (MUHURI).....PETITIONERS

VERSUS

1. THE HON. ATTORNEY GENERAL

2. CABINET SECRETARY, MINISTRY OF TRANSPORT AND

INFRASTRUCTURE

3. NATIONAL ASSEMBLY.....RESPONDENTS

AND

1. KENYA PORTS AUTHORITY

2. MEDITERRANEAN SHIPPING COMPANY

3. KENYA SEAFARERS WELFARE ASSOCIATION

4. SEAFARERS UNION OF KENYA

5. MOHAMMED MAWIRA.....INTERESTED PARTIES

JUDGMENT

Introduction

1. The 1st Petitioner is a Workers Union whose members work in various capacities at the Kenya Ports Authority in Mombasa and elsewhere in the country, while the 2nd Petitioner is a registered community group based in Mombasa.

2. The 1st Respondent is the Hon. The Attorney General of the Republic of Kenya, while the 2nd Respondent is Cabinet Secretary, Ministry of Transport and Infrastructure. The 3rd Respondent is the National Assembly of Republic of Republic of Kenya.

3. The 1st Interested Party is a State Corporation while the 2nd Interested Party is a limited liability company. The 3rd and 4th Interested Parties are welfare associations while the 5th Interested Party is a person adult of sound mind.

The Petitioners' Case

4. By the petition dated and filed herein on 15/7/19 the Petitioners aver that shipping and port activities in the Republic of Kenya are regulated by various statutes among them the Kenya Ports Authority Act and the Merchant Shipping Act, 2009 (The Act). The Act was enacted to make provision for the registration and licensing of Kenyan ships, to regulate proprietary interests in ships, the training and the terms of engagement of masters and seafarers and matters ancillary thereto, to provide for the prevention of collisions, the safety of navigation, the safety of cargo, carriage of bulk and dangerous cargo, ship ownership, inquiries and investigations into marine casualties; to make provision for the control, regulation and orderly development of merchant shipping and related services; generally to consolidate the law relating to shipping; and for connected purposes.

5. The Petitioners point out that the Act imposed restrictions on ship owners from providing certain services set out in Section 16, which provides:

"(1) No owner of a ship or person providing the service of a shipping line shall, either directly or indirectly, provide in the maritime industry the service of crewing agencies, pilotage, clearing and forwarding agent, port facility operator, shipping agent, terminal operator, container freight station, quay side service provider, general ship contractor, haulage, empty container depots, ship chandler or such other service as the Minister may appoint under Section 2.

(2) Any person who contravenes the provisions of subsection (1) commits an offence and shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both such fine and imprisonment."

6. The Petitioners state that early this year, the 3rd Respondent sought to amend the above provision through the Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No. 21 of 2019) (The Bill). In the Bill, the 3rd Respondent introduced Section 16 (1A) which provided:

"(1A) The provisions of subsection (1) shall not apply to a shipping line wholly owned by the Government."

7. On the 13/7/19, the 3rd Respondent passed the Bill which was presented to the President for Assent. However, in exercise of his powers under Article 115 (i)(b) of the Constitution, the President, by way of a Memorandum dated 18/6/19 referred the Bill back to

the 3rd Respondent for reconsideration. The President had therein expressed his reservations on the provisions relating to the Act, powers granted to the 2nd Respondent in regard to granting exemptions to shipping lines owned by the Government. Subsequently, the 3rd Respondent acceded to the President's recommendation and passed the Bill and on the 4/7/19. The President assented to the Bill thereby introducing Section 16 (1A) which stipulates:

"(1A) The provisions of subsection (1) shall not apply to a shipping line owned or controlled by the Government."

8. The Petitioners contended that in the year 2014 the government initiated a process for procurement of a firm to operate and manage part of port of Mombasa. However, the said process did not materialise. But sometime in 2019 the Petitioners learnt through the press that the government had entered into a Memorandum of Understanding (MOU) between the 2nd Respondent and the 2nd Interested Party, whereby the later was granted rights to manage and operate the Container Terminal Two CT 2. The Petitioners then sought for further information on the alleged MOU from the 1st Interested Party who informed them that they had referred the issue to the Parent Ministry. The Petitioners contended that there was no further communication in respect of the MOU from either the Parent Ministry or the 1st Interested Party.

9. The Petitioners are aggrieved by the new amendments to the Act, and take issue with the manner in which the Government purported to enter into the MOU with respect to CT 2. They allege that the amendments and the MOU were done contrary to the Constitution of Kenya, 2010, and threatened violation of the fundamental rights and freedoms of the Petitioners and the people of Mombasa County in general.

Legal Foundation of the Petition

10. The petition is centrally pivoted on Articles 10, 21, 22(1), 35, 43, 46, 55, 118, 174, 258 of the Constitution to the extent that these articles preserve access to justice, socio-economic rights, access to information, public participation and protection of fundamental rights and freedoms, and devolution.

11. It is the Petitioners' case that their rights and those for whom they have filed this petition have been violated by the Respondents in association with some of the Interested Parties. The Petitioners aver that the passage of and introduction and passage of Section 16 (1A) of the Act is unconstitutional. They aver that the reservations by the President were neither subjected to public participation nor were the Petitioners involved in the same.

12. The Petitioners contend that they have been denied access to information regarding the MOU by the Respondents and the 1st Interested Party contrary to Article 35 of the Constitution.

13. Arising from above grievances, the Petitioners pray for the following orders:

(i) A Declaration does issue that the Memorandum of Understanding entered into between the Government of Kenya, vide the Ministry of Transport and Infrastructure and the Mediterranean Shipping Company over part of the Terminal at the Port of Mombasa is illegal and unConstitutional and contrary to Articles 10, 12(1), 21, 27, 35, 40, 43, 46, 47, 54, 55, 56, 57, 73, 118, 174, 201, 227 and 232 of the Constitution of Kenya, 2010.

(ii) A Declaration does issue that the new amendments to the Merchant Shipping Act vide the Statue Law (Miscellaneous Amendments) Act, 2019 is illegal and unConstitutional and contrary to Articles 10, 12(1), 21, 27, 35, 40, 43, 46, 47, 54, 55, 56, 57, 73, 118, 174, 201, 227 and 232 of the Constitution of Kenya, 2010.

(iii) An Order awarding costs of the petition to the Petitioners.

(iv) Any other or further ores, writs ad directions this Court considers appropriate and just to grant for the purpose of the enforcement of the Petitioners fundamental rights and freedoms.

14. The petition is supported by affidavits of **Simon K. Sang**, **David Mzungu Shume** and **Peter Ponda Kadzeha.** The 3rd Petitioner was struck out from the petition and has not participated in this petition.

The Response

15. The petition is opposed by the Respondents and the 1st to 4th Interested Parties, while the 5th Interested Party supports the petition.

1st Respondent's Case

16. In opposing the petition, the 1st Respondent filed a Replying Affidavit sworn by Mr. Kennedy Ogeto, the Solicitor General on 7/8/19. The 1st Respondent denies the allegations by the Petitioners that there was no public participation in effecting the aforesaid amendment to the Act. Mr. Ogeto deponed to sequence leading to what he referred to as public participation in the process as follows:

(i) The Bill was published on 29/3/19 and first read on 3/4/19. It was thereafter committed to the respective Departmental Committees for consideration and facilitation of public participation pursuant to Standing Order 127 of the National Assembly Standing Orders.

Mr. Ogeto further stated that the relevant Committee received Memoranda from seven stakeholders namely –

(a) The Task Catering Institute

(b) The Coastal Parliamentary Group

(c) Mr. Nyainda Paul Henry

(d) Seafarers Union of Kenya

(e) Hon. Mohamed Faki, Senator Mombasa County

(f) Maritime Industry Associations; and

(g) The State Department for Shipping and Maritime Affairs

He confirmed that the Bill was passed on 13/6/19.

17. The 1st Respondent's case is that the maritime industry associations submitted their written memorandum in support of the amendment. The 1st Respondent states that the Petitioners are merely challenging the Constitutional prerogative of the 3rd Respondent in exercising its delegated sovereign function of legislation without stating with specific clarity how the impugned amendments have breached any provision of the Constitution.

18. It is the 1st Respondent's case that Article 115 of the Constitution allows the President to exercise his powers of referral of bills to 3rd Respondent without usurping the latter's legislative role. In exercise of these powers the President noted his reservations and made recommendation on the Bill which the 3rd Respondent approved and passed. It was the 1st Respondent's case that the President regarded the amendment as crucial in reviving the Kenya National Shipping Line (KNSL) to facilitate collaboration with critical partners to enhance competitiveness in regional and global shipping markets in tandem with the international practice. The 1st Respondent denied any allegations that CT 2 was being privatized, and states that the reorganization is meant to bring on board a government entity to manage CT 2 with a view to improve efficiency and offering education, training, employment and business opportunities.

2nd Respondents Case

19. The 2nd Respondent opposed the Petition vide a Replying Affidavit sworn by Josephine Onunga on 7/8/19. The deponent is the Secretary Administration, in the State Department for Shipping and Maritime, in the Ministry of Transport.

20. The Department is responsible for the operationalization and revival of KNSL. The 2nd Respondent reiterates the position taken by the 1st Respondent. In addition, the 2nd Respondent faults the Petitioners for not annexing the impugned Act. As such the Petitioners cannot benefit from the orders sought. The 2nd Respondent denies that the effect of the said amendment is to hand over the operations of the CT 2 to a private entity whereas it is clear that the amendment removes the restriction and exempts government owned or controlled entities from the provisions of Section 16 (1) of the Act. Further, the 2nd Respondent contended that by virtue of the constitutionality of laws made by Parliament the onus was on the Petitioners to prove otherwise, the burden which the Petitioners have not discharged. It was the 2nd Respondent's case that the Bill having been subjected to public participation earlier, there was no further requirement or constitutional obligation to again subject the President's reservation to public participation.

21. It is the 2nd Respondent's case that the MOU was a framework for the revival of KNSL wherein the government had majority shareholding through the 1st Respondent. The import of the MOU was to allow reorganization of port services through KNSL for efficiency, job creation, and to increase Kenya's competiveness in maritime services.

22. The 2nd Respondent urged the Court to give difference to doctrine of separation of powers and refrain from declaring policy and legislative functions by the Executive and the Legislature as unconstitutional.

3rd Respondent's Case

23. The 3rd Respondent opposed the petition vide the replying affidavit sworn by **Michael Sialai,** on 8/8/19. He avers that the Petitioners' prayers threaten the legislative role of Parliament and specifically Articles 1(1), 94 and 95 of the Constitution and restricts the 3rd Respondent from carrying out its constitutional mandate as per Article 95 (3) of the Constitution. As such the petition contravenes Article 109 of the Constitution.

24. The 3rd Respondent re-affirms the depositions on behalf of the 1st and 2nd Respondent in relation to the process of passing the Bill and ultimate enactment of the impugned Section 16 (1A) of the Act. To support its position, it produced copies of memoranda by various stakeholders, the reports of the relevant Committee and the President's Memorandum.

25. It is the 3rd Respondent's case that the correct procedure was followed when the Bill was referred back by the President. In that case the 3rd Respondent may amend the bill in light of the President's reservations or pass the same a second time without amendments. That the amendment to the Act was passed in accordance with the Constitution and the 3rd Respondent's Standing Orders.

Interested Parties

1st Interested Party's Case

26. The 1st Interested Party opposed the Petition vide a Replying Affidavit sworn by **Addraya Dena** on 8/8/19 and a Preliminary Objection dated 18/7/19. It is the 1st Interested Party's case that this Court has no jurisdiction to entertain the petition as the issue is purely of a commercial nature on the reorganization of KNSL in which 1st Interested Party is a majority shareholder. That the Petitioners had not specifically demonstrated how their rights had been infringed.

2nd Interested Party's Case

27. The 2nd Interested Party opposed the petition vide a replying affidavit sworn by **Issa Muslim** on 8/8/19. Mr. Muslim is the Managing Director of Ocean Freight EA Limited which is a wholly owned subsidiary of the 2nd Interested Party.

28. The 2nd Interested Party contends that it is the world's second largest shipping line in terms of container vessel capacity operating more than 510 container vessels and has world's largest privately owned cruise ship division. Through capital contribution made in 1997 the 2nd Interested Party became 47% shareholder in KNSL. The 2nd Interested Party supported the case

by the Respondents and further contended that there was no privatization of CT 2 because privatization is a process carried out by a legal regime regulated by the Privatization Act which is not the case in this matter.

29. The 2nd Interested Party drew attention of this Court to conservatory orders issued in **High Court Petition No. 18 of 2010 Maersk Kenya Limited & 14 others vs. The Attorney General and 2 others** suspending the operation of Section 16 (1). Therefore, according to the 2nd Interested Party, there was no longer any restrictions under Section 16 (1) and therefore the new amendment was in order.

30. On the MOU the 2nd Interested Party's Case is that the same being a private arrangement between the parties to it, there was no need to subject it to public participation.

3rd Interested Party's Case

31. As regards the 3rd Interested Party Mzee Khamisi Athumani, its Secretary General swore a replying affidavit on 8/8/19 in opposition to the petition. Its case is that the Petitioners not being stakeholders in the Shipping or Maritime Sectors, are not bonafide litigants but mere fronts for other stakeholders to oppose the proposed reforms by the government in the Sector.

32. It is the 3rd Interested Party's case that whereas the economic value of Kenya's Maritime and shipping industries is considerable the people of Kenya are yet to derive significant benefits from them precisely because the historical reality is that these sectors are dominated by foreign organizations and their local subsidiaries. Despite the enactment of the Merchant Shipping Act No. 4 of 2009 with the objective to localize the Industry nothing so far has changed and the Government needed to make drastic measures to achieve the main objectives of the Act. The 3rd Interested Party supports these initiatives by the Government. The 3rd Interested Party states that by virtue of Article 12(1), 45 and 69(1) of the Constitution the Government is enjoined to take all legal, policy and economic measures to ensure that to the maximum extent possible Kenyans must be the principal beneficiaries of their natural resources because across the world citizenship counts for something in allocation of national resources and that amendment of Section 16 of the Merchant Shipping Act to introduce the impugned Section 16(1A) is a critical step to give Kenyan stakeholders a real stake in these lucrative sectors. The 3rd Interested Party avers that the impugned amendment was intended to realize the government's obligation under Articles 1, 43 and 95 of the Constitution in formulation of policies to secure economic development. The Petitioners had not specified how the impugned amendment and the MOU had violated the Constitution. In addition, since enactment in 2009, the Act had not achieved its objective and the amendment was geared towards filling that lacuna.

The 4th Interested Party's Case

33. In response to the Petition, **Mr. Stephen Owaki** swore a replying affidavit on 8/8/19 and adopted his supporting affidavit of 17/7/19. The 4th Interested Party states that the process through which the impugned amendment was effected was procedural and lawful and did not breach the Constitution. As regards the MOU the 4th Interested Party avers that the same has been in the public domain through public participation and educational fora and use of social and print media and that the Petitioners chose not to be involved. Further, that the 2nd Interested Party has already employed 100 Kenyans as seafarers and there was room for additional employment.

The 5th Interested Party's Case

34. The 5th Interested Party in support of the Petition filed his replying affidavit sworn on 7/8/19. He relied on his supporting affidavit in support of his application to be enjoined as the 5th Interested Party sworn on the 17/7/19. He contended that the MOU had been entered into secretly and in breach of Articles 10, 27 and 227 of the Constitution.

The 5th Interested Party states that the State has denied local contractors and industries an opportunity to provide services at the port of Mombasa yet they are the major employers of Kenyan youth. He urged the Court to allow the Petition.

Submissions

35. The petition was canvassed through written submissions which were orally highlighted in Court.

Petitioners Submissions

36. **Mr. Nyandieka** and **Mr. Ochieng**, learned counsel for the Petitioners submitted that the Respondents have a duty to disseminate the information contained in the M.O.U without being prompted as provided under Article 10 of the Constitution. The failure by the state to publish and share the M.O.U with the public was in contravention of Article 35 of the Constitution. For authority **Mr. Nyandieka** cited **Mohamed Ali Baadi and Others vs. Attorney General & 11 Others, Petition No. 22 of 2012, [2018].**

37. On the issue of jurisdiction, the Petitioners submitted that this Court would be sitting on appeal of its own decision as the **Hon. Justice P. J. Otieno** had already ruled that the present Petition raised weighty constitutional issues and it was on that basis that this Bench was empaneled, thereby resolving the issue of jurisdiction. As to whether the M.O.U is illegal, unconstitutional and contrary to Articles the Constitution, the Petitioners submitted that the M.O.U lacked transparency, openness and public participation as the same is shrouded in mystery and the Petitioners have been left to stumble upon newspaper reports, advertisement, social media and online report to get information on the M.O.U on the transfer of CT 2. Mr. Ochieng submitted that the Constitution must be interpreted to give effect to our national values and principles that are an integral part in governance as was acknowledged in the cases of **Okiya Omtata Okoiti vs. County Government of Kiambu, Petition No. 48 Of 2018** and **Independent Electoral And Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others Civil Appeal No 224 Of 2017.**

38. Counsel submitted that there was blatant disregard of Article 227 of the Constitution as the state failed to employ a procurement process in line with the Constitution in handpicking the 2nd Interested Party discreetly and entering into an M.O.U with it without utilizing a system that is fair, equitable, transparent, competitive and cost-effective. Counsel submitted that the M.O.U is illegal as the 2nd Respondent did not have the powers to enter into such arrangements with a company which is not wholly owned by the Government as the same is contrary to Section 16 of the Act.

39. On whether the amendments to Section 16(1A) of the Act is illegal and unconstitutional Counsel submitted that the amendment, proposal and recommendations by the president were in breach of Articles **10; 27; 35; 73; 118; 174; 201 and 232** of the Constitution as they ought to have been brought by way of a substantive amendment law to the Act instead of a Statute Law Miscellaneous Amendment Act. For this proposition the Petitioners referred to the case of **Law Society of Kenya vs. Attorney General & Another, Petition No. 3 of 2016.**

1st Respondent's Submissions

40. On whether the amendment to the Act was unconstitutional, **Mr. Gatonye** for the 1st Respondent submitted that the allegations that the amendment is aimed at privatization of CT 2 are unfounded as the exemption under Section 16(1A) only applies to shipping lines owned or controlled by the Government. Counsel submitted that there was full compliance with the principles of transparency and public participation contained in the Constitution. He submitted that once public participation is done there is no further requirement for public participation where the bill is returned back to the National Assembly with reservation as none is contemplated under Article 115 of the Constitution. For this submission Counsel cited Court of Appeal decision in **Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 others [2018] eKLR.**

41**. Mr. Gatonye** denied the allegation by the Petitioners that there has been a breach of Article 35 (1) of the Constitution on the right to information. He refuted the allegation that the Petitioners had written a letter asking for information. Counsel submitted that the Access to Information Act, 2016 was enacted to give effect to Article 35. Section 8(1) & (2) of that Act provides for mechanisms of accessing information and the right to information is not absolute. Mr. Gatonye submitted that the legislative process through which Section 16 of the Act was enacted was constitutional, with the sole aim of benefitting the public and that this Court should not impugn the process.

2nd Respondent Submission.

42. **Mr. Nyamodi**, learned counsel for the 2nd Respondent, in his submissions impugned the Supporting Affidavits of **Simon K. Sang** sworn on the 13/7/19 and **Hassan Abdile** dated 15/7/19 together with all the annexures thereto on the basis that the 1st and 3rd Petitioners had withdrawn from or been struck out of the petition. Submitting on the amendment to Section 16 of the Act through an Omnibus Act, Counsel submitted that the issue was never raised in the Petition or in the evidence on record and the same was only introduced at the submissions stage. Consequently, the same should be ignored. Counsel cited the case of **Clips Ltd vs. Brand**

imports (Africa Ltd formerly named Brand Imports Ltd [2015] eKLR where it was held that it is trite law that new issues cannot be raised in submissions.

43. **Mr. Nyamodi** also disputed the jurisdiction of this Court, submitting that the M.O.U between the 2nd Respondent and the 2nd Interested Party is a contractual issue to which the Petitioners are not parties. Therefore, the same can only be litigated by parties in accordance with the doctrine of privity of contract. To buttress that submission reliance was placed on the finding in **Republic vs. Receiver Manager Imperial Bank Limited (in Receivership) ex-parte Amool Jivraj Nathwani [2019] eKLR.** Mr. Nyamodi urged the Court to find that the purpose of the M.O.U was to establish a framework for the revival of KNSL and not privatization of CT 2. Consequently, Article 227 was not applicable in this Petition. That under Article 46 of the Constitution, there exists a dispute resolution mechanism under the Consumer Protection Act to address the Petitioners' allegations. Counsel submitted that this Court ought to exercise the principle of Constitutional avoidance, relying on the Court of Appeal decision in **Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority**, and dismiss the petition with costs.

The 3rd Respondent's Submissions

44. **Mr. Mwendwa**, learned Counsel for the 3rd Respondent submitted that the public was involved in the process of enactment of the Statute Law (M*iscellaneous Amendment Act*) 2019 ("the amendment Act) via submissions and memoranda from stakeholders. Consequently, the amendments to the Act did not violate the principle of public participation under the Constitution. In addition, Counsel submitted that the principle of separation of powers requires that there be mutual respect between the Courts and the legislature and that miscellaneous amendment bills are used by parliament to consolidate amendments due to backlogs of unlegislated areas in order to save on parliamentary time. It was the submission of the 3rd Respondent that it is not the province of the Courts to interfere with policy decisions of the Executive, or with the legislative competence of Parliament, and that the duty of the court is to establish whether or not there was public participation in the process of legislation.

1st Interested Party's Submissions

45. **Mr. Khagram**, learned Counsel for the 1st Interested Party submitted that the Petitioners alleged breaches are nothing more than speculative as regard the M.O.U and they fall short of the requirement laid down in the **Anarita Karimi Njeru** case and emphasized in the **Mumo Matemu** case. Counsel submitted that the petition does not meet the relevant constitutional threshold to constitute a constitutional petition and being merely speculative the same should be dismissed with costs.

46. Secondly, relying on Sections 107 and 109 of the Evidence Act, Counsel submitted that one who asserts must prove, and one who relies on the existence of a document must produce it for its authenticity. In this regard Mr. Khagram submitted that the Petitioners have not discharged their burden of proof for failure to produce the impugned M.O.U. This failure means and should be construed to mean that there is in fact no such MOU, and that the petition should be dismissed for being speculative. Mr. Khagram further submitted on the Preliminary Objection filed by the 1st Interested Party, stating that the alleged MOU is founded on commercial law principles and that any issues arising therefrom should be determined in the Commercial Court and should not be the subject of a constitutional petition.

2nd Interested Party's Submissions

47. **Mr. Kamau Karori**, learned Counsel for the 2nd Interested Party relied on their pleadings and on submissions of the 1st and 2nd Respondents. Counsel submitted that the said MOU is a commercial document which raises no constitutional issues. Mr. Karori submitted that the relationship between KNSL and the 2nd Interested Party goes as far back as 1997 and is purely commercial. The said MOU is merely to formalize an existing commercial arrangement with the main purpose of improving the performance of KNSL and creating wealth and employment opportunities for the youth.

48. Counsel referred to the legislative process in the enactment of Section 16 (1A) of the Act and submitted that the Court was incompetent to impugn legislative arrangements on the basis of the doctrine of separation of powers. He further submitted that it is the duty of the Executive to create conducive environment for economic growth. This is through policy formulation and the Court should not fault the Executive in the process of policy execution.

3rd Interested Party's Submissions

49. **Mr. Kibe Mungai**, learned Counsel for the 3rd Interested Party relied on and was in consonance with submissions made by the Respondents. He submitted that upholding the constitutionality of the impugned amendment and M.O.U is critical to the realization of the rights of the members of the 3rd Interested Party enshrined in Article **27, 28, 41, 43** and **55** of the Constitution. Reliance was placed in the case of **Jayne Mati & Another vs. Attorney General & Another [2011] eKLR paragraph 42, 46-48,** where it was held that every failure to follow the letter of the Constitution harms the Constitution itself, breeds cynicism and encourages impunity.

4th Interested Party's Submissions

50. **Mr. Angelo Owino**, learned Counsel for the 4th Interested Party submitted that the process through which the 3rd Respondent sought to and amended Section 16 of the Act was procedural and lawful and did not breach the Constitution. As regards the M.O.U., Counsel submitted that the same has been in the public domain through public participation and educational fora and use of social and print media and it is through the selfish interests of the Petitioners that they chose not to be involved.

51. Further, Counsel submitted that members of the 1st Petitioner are employees of the 1st Interested Party and it has not been demonstrated that their employer is carrying out a retrenchment or laying off employees. Therefore, the management and control of CT 2 by the 2nd Interested Party is not a threat to Kenya's national sovereignty, as Kenya stands to benefit from creation of jobs and employment opportunities.

5th Interested Party's Submissions

52. **Ms. Murage**, learned Counsel for the 5th Interested Party submitted that this Court has jurisdiction under Article 165(3) (b) of the Constitution to entertain the Petition. She further submitted that the process by which the State procured the services of the 2nd Interested Party as a joint partner in management of CT 2 was not in accordance with Article 227 of the Constitution, as the State did not employ an open tendering process but opted to arbitrarily handpick the 2nd Interested Party. The 5th Interested Party adopted the entire submissions of the Petitioners and urged the Court to allow the petition with costs.

53. From the pleadings and submissions, the following are the issues that arise for determination:

(i) Whether this Court has the jurisdiction to entertain the petition.

(ii) What is the effect of the withdrawal from the petition by the 1st and 3rd Petitioners"

(iii) What is the effect of failure by the Petitioners to produce a copy of the impugned law"

(iv) Whether the enactment of Section 16 (1A) of the Act is unconstitutional.

(v) Whether it was proper to amend Section 16 of the Act through the Statute Law (Miscellaneous Amendments) Act, 2019.

(vi) Whether the Memorandum of Understanding is unconstitutional.

Whether this Court has the jurisdiction to entertain this petition

54. The 1st Interested Party challenged the jurisdiction of this Court to entertain the petition vide its Preliminary Objection dated 18/7/19 on the following grounds:

(a) This Honourable Court has no jurisdiction to hear and determine this petition as it is not, strictly speaking, one that relates to protection of any right under the Bill of Rights capable of protection by this Honourable Court nor have the Petitioners identified, with sufficient particularly, the provisions of the Constitution which they allege have been breached and/or infringed;

(b) Further, the issues arising out of the matters complained of are not only purely commercial in nature related to questions of contractual duties, obligations and breaches thereof and cannot be the subject of a Constitutional petition or a violation thereof but are also speculative and matters of conjecture;

(c) The Petitioners have been less than candid with this Honourable Court and it appears from a plain reading of the petition sole objective is to obstruct, impede, frustrate and/or delay the revival of the Kenya National Shipping Line Limited, a subsidiary of the First Interested Party;

(d) At best, the Petitioners have, in the petition, only set out and repeated various Articles of the Constitution and have not stated which, if any, of these have been infringed and how; and

(e) The Petitioners are, by legal craft, abusing the process of this Honourable Court by circumventing the ordinary process of the law and disguising their claim as a Constitutional matter when, in fact, it is not.

55. The issue of jurisdiction was raised prior to the hearing of the petition. However, the Court ruled that the jurisdiction issue would be resolved together with the resolution of the petition. Mr. Khagram, learned counsel for the 1st Interested Party, cited the *locus classicus* on jurisdiction, **Owners of Motor Vessel "Lillian S' vs. Caltex Oil (Kenya) Limited [1989] KLR 1** where the Court of Appel held as follows: -

"…it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

56. Counsel submitted that the Petitioners are seeking a declaration to have the MOU, which was not produced before this Court, declared illegal and unconstitutional. He submitted that the MOU is said to relate to the management of CT 2. Mr. Khagram submitted that it is therefore common ground that this is a commercial transaction relating to the management of CT 2 that is the subject of challenge now, and that being so, it is a matter for the Commercial and not the Constitutional Court. To buttress this submission counsel relied on **Godfrey Paul Okutoyi vs. Habil Olaka & another [2018] eKLR** where the Court held *inter-a-lia* that, the breach alleged being premised on contractual and/or commercial transactions which could be redressed through ordinary civil courts ought not to be made the subject of a Constitutional petition; and that it is an established principle of law that anyone who wishes the Court to grant relief for violation of a right or fundamental freedom, must plead in a precise manner the Constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it.

57. Counsel submitted that according to pleadings, the grievances of the Petitioners arise out of a commercial understanding relating to the revival of the KNSL, a state corporation in which the 1st Interested Party is a majority shareholder. Counsel further submitted that challenges to or enforcement for commercial arrangements between parties cannot be the subject of challenge in a Constitutional petition which predominantly relates to redress for an infringement of a clearly identified right, which has Constitutional protection.

58. In response Mr. Ochieng, learned counsel for the Petitioners submitted that the petition primarily raises Constitutional issues affecting the Petitioners' fundamental rights including the right to human dignity to earn a living. Counsel submitted that commercial arrangements referred to under the MOU is merely a small aspect of this petition, and even that constitutes a violation of economic and social rights under Article 43 of the Constitution.

59. It is to be noted that other parties submitted very scantily on this issue. They merely stated that the petition raises a commercial issue which should be determined in the Commercial Court.

60. We have considered the issue of jurisdiction as raised herein. The issue is not that the matter before the Court is not justiciable, or that it has a political aspect which is best left to the executive arm of government to deal with, but that the issues raised in the petition can be dealt with in another forum being the Commercial Court, and not through a Constitutional Petition. The 1st Interested Party's main argument on this issue is that the petition is asking this Court to make commercial proposals, which is not a

function of a Constitutional court, and hence not justiciable in this Court.

61. It is evident from the proceedings herein that the two main criteria that will influence the justiciability of this petition before this Court are firstly, whether there is a clear Constitutional commitment and mandate to a particular division of the High Court to make a decision on the issue, and secondly even where such a Constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved in this Constitutional petition. As regards the first criteria, this Court is the Constitutionally mandated organ with jurisdiction to adjudicate and make final decisions in two specific aspects, namely the violation and protection of human rights and freedoms, and the Constitutionality of laws and actions of state organs. Under Article 23(1) of the Constitution jurisdiction is conferred upon this Court in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or a threat to, a right or fundamental freedom in the Bill of Right. Article 165(3) provides as follows:

"Subject to Clause (5), the High Court shall have –

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) Any matter relating to Constitutional powers of state organs in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation."

62. Pursuant to the foregoing, this Court is of the view that, a constitutional petition may raise issues which cut across the various divisions of the High Court. In our view, the issues raised in the petition concerning the operations of CT 2 are raised in the context of the application of Article 43 of the Constitution on socio-economic rights of the residents of Mombasa County and the Petitioners, and of Article 55 of the Constitution on employment for the youth of Mombasa County. Further, the issue is intertwined with the alleged unconstitutionality of Section 16 (1A) of the Act. It is the finding of this Court that the complaints by the Petitioners, therefore, raise Constitutional issues which are within the jurisdiction of this Court, and which this Court has powers to resolve.

What is the effect of the withdrawal from the petition of the 1st and 3rd Petitioners"

63. When this Petition was filed on 15/7/19, there were 3 Petitioners. The Petition was supported by the affidavits sworn by representatives of each of the 3 Petitioners. However, on 18/7/19, on their respective applications, 1st Petitioner was allowed to withdraw from the Petition while the 3rd Petitioner was struck off the same.

64. It has been argued by the 2nd Respondent that the depositions sworn on behalf of the 1st and the 3rd Petitioners including the annexures thereto do not form part of the evidence in support of the Petition. The Petitioners cannot therefore rely on the same.

65. We have considered the foregoing. Our view is that a party who withdraws from, or is struck off a suit goes out of the suit with all his pleadings. Nothing filed by such a party is left on the record. In the case of **Sammy Ndung'u Waity vs. Independent Electoral and Boundaries Commission & 3 others [2018] eKLR**, the Court of Appeal had occasion to consider the effect of a petitioner's withdrawal from a petition on his affidavit and annexures. The Court rendered itself thus.

"It bears repetition to state that there were two petitioners in the petition filed at the High Court, the appellant (the then 1st petitioner) and the 2nd petitioner. On 18th October 2017 the 2nd petitioner filed an application to withdraw from the Petition. In a ruling of 9th November 2017 the learned Judge allowed the 2nd Petitioner to withdraw from the petition. The effect of the withdrawal is that the 2nd petitioner's affidavit in support of the petition had no legs to stand on. It also follows that the annextures to the 2nd petitioner's supporting affidavit that had fallen by the way side had no legs to stand on. It was unfortunate that the affidavits of Danson Apaol Ngimor, Darwin Rionomutu Pombo, Maira Kang'aror, Musa Makal Tulu and Mamukong Simau were attached to the 2nd petitioner's affidavit as annextures. The 2nd petitioner having withdrawn his affidavit, the annextures thereto could not remain as part of the record. We do not find any error on the Judge's conclusion that these annextures had to be expunged from the record. The appellant's complaint therein is unmerited and is hereby dismissed."

66. Duly guided by the holding in the foregoing case, we find that the affidavits in support of the Petition filed by the 1st and 3rd Petitioners fell by the wayside the moment they departed from the proceedings herein. However, on 26/8/19, following an application dated 21/8/19, which was not objected to, the 1st Petitioner was reinstated to the Petition. The Court ruled:

"The Application dated 21/8/2019 by Dock Workers Union for reinstatement to the proceedings is allowed on the condition that the Applicant will not file any further documents but will rely on what it has already filed on record."

67. The effect of the Ruling of the Court is that the affidavit sworn on behalf of the 1st Petitioner and all annexures thereto now form part of the record having been reinstated contemporaneously with the 1st Petitioner, to these proceedings. However, the affidavit and the annexures of the 3rd Petitioner remain expunged from the record and may not be relied upon.

What is the effect of failure by the Petitioners to produce a copy of the impugned law"

68. The 2nd Interested Party in its affidavit stated that the impugned Section 16 (1A) of the Act was not before the Court. Mr. Karori Kamau, learned counsel for the 2nd Interested Party, taking up the issue, submitted that in the absence of the impugned amendment, there was not enough material before the Court for the advancement of a claim of infringement and violation of Constitutional rights as alleged in the petition. Counsel submitted that the supporting affidavit to the petition sworn by David Mzungu Shume did not include a copy of the impugned Section 16 (1A) of the Act, and that therefore, this Court cannot proceed on the basis of an unknown document or occurrence.

69. In response, Mr. Ochieng, learned counsel for the Petitioners submitted that the impugned amendment to Section 16 of the Act is a fact which this Court should take judicial notice of, and dismiss the allegation.

70. We have keenly looked at the record placed before the Court. The 1st Respondent through a Notice of Motion filed on 22/7/19 and vide supporting affidavit of Mary Njuya sworn on 22/7/19 attached as "MN 2" a Special Issue of Kenya Gazette Supplement Acts, 2019 dated 9/7/19. The said Special Gazette Supplement contained The Statute Law (Miscellaneous Amendments) Act,2019 which amended the said Section 16(1) by inserting sub-section (1A).

71. The said Kenya Gazette Supplement containing the said amendment to the Act was brought to the attention of this Court by none other than the Hon. The Attorney General. Further, this Court has the inherent authority to assume the existence of a law which has been passed by Parliament. It is therefore our finding that the impugned amendment to Section 16 of the Act is regularly before the Court and allegations by the 2nd Interested Party to the contrary is misleading and is dismissed.

Whether enactment of Section 16 (1A) of the Act is unconstitutional

72. Before we consider this issue, we propose to deal with a matter that was raised by the Respondents. It was submitted by the Respondents that, this Court should not venture into the legislative arena which is the preserve of the 3rd Respondent, in deference to

the doctrine of separation of power. That since the 3rd Respondent's legislative functions are donated by **Article 94 of the Constitution,** this Court should decline the invitation to intrude into what the 3rd Respondent had legally and Constitutionally undertaken. The Petitioners submitted to the contrary. The view we take is that, what is required is self-restraint and caution in undertaking judicial review of the workings of the Legislature.

73. The doctrine of separation of power is not a bar to the Court inquiring into the process by which legislation is arrived at. In **Miari vs. Knesset Speaker [1988] Israel SC 42(4) 868,** at pg.873, the Supreme Court of Israel held: -

"The High Court of justice is not obliged to exercise every power that it is given. The court has discretion in exercising the power. Use of this discretion is especially important in so far as judicial review acts of organs of the legislature is concerned. We will therefore intervene in internal parliamentary proceedings only when there is an allegation of a substantial violation, which involves a violation of fundamental values of our Constitutional system… this self-restraint should find its greatest expression when the proceedings in which the intervention is sought is the legislative process itself." *(underlining provided)*

74. Closer home, in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011,** the Supreme Court of Kenya held: -

"The effect of the Constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-power is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation."

75. And, in **Law Society of Kenya v. Attorney General & another [2016] eKLR,** after reviewing several authorities on the principle of separation of powers, a 5 Judge Bench of this Court held: -

"We are duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the Constitution, has the duty and the obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In this regard, as this petition alleges a violation of the Constitution by the Respondents, it is our finding that the doctrine of separation of power does not inhibit this court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court."

76. From the foregoing, it is clear that courts will interfere with actions of other State organs where it is alleged that they are either acting illegally or in violation or threatened violation of the Constitution.

77. In the present petition, the Petitioners have alleged that the Respondents have violated certain articles of the Constitution. That the amendment to **Section 16 of the Act** has violated specifically, **Articles 10 and 118 of the Constitution.** That being the basis of the petition before us, there could be no better forum than this Court, by virtue of **Article 165 (3) of the Constitution,** where the actions of the respondents could be questioned.

78. In this regard, we firmly hold and reiterate what the Court stated in the case of the **Law Society of Kenya vs. Attorney General & another (supra),** that this Court has the power to enquire into the Constitutionality of the actions of the 3rd Respondent, notwithstanding the doctrine of separation of powers and the privilege of debate accorded to its members and its proceedings. This is fortified by the principle of the supremacy of the Constitution and that every State organ, the 3rd Respondent included, must operate within the strict confines of the Constitution. The organ to ascertain that fact, is this Court. In so doing, this Court will be executing its mandate under **Article 165 (3) of the Constitution.**

79. We will now proceed to consider the alleged unconstitutionality of **Section 16 (1A) of the Act.** The Petitioners alleged that, the amendment to **Section 16** of the Act by the introduction of **Section 16 (1A)** was unconstitutional; that there was no public participation in its enactment which was a violation of various provisions of the Constitution including **Articles 10** and **118.** The cases of **Law Society of Kenya vs. Attorney General & another [2016] eKLR, Kenya Human Rights Commission vs. Attorney**

General & another [2018] eKLR and **Simeon Kioko Kitheka & 18 others vs. County Government of Machakos & 2 others [2018] eKLR** were relied on.

80. All the Respondents and the 1st to 4th Interested Parties denied that allegation. They contended that there was adequate public participation; That the 3rd Respondent published in the *Dailies* of 10/4/19 a notice inviting memoranda; that the stakeholders were involved and they gave their views before the amendment was enacted. They contended that it was not necessary that all persons are notified and give their views. The case of **Law Society of Kenya vs. Attorney General & another (supra)** was relied on for that submission.

81. The Respondents further submitted that there was a presumption of the Constitutionality of legislation and that the Petitioners had not rebutted that presumption. The cases of **Law Society of Kenya vs. Kenya Revenue Authority & another [2017] eKLR** and **Katiba Institute & another vs. Attorney General & another [2017] eKLR** were cited in support of these submissions.

82. It was further submitted that in considering the Constitutionality of the impugned section, the Court should consider its purpose and effect. **Olum and another vs. Attorney General [2002] 2 EA 508** was cited in support of this submission.

83. We propose to consider the issue of public participation in the amendment of **Section 16** aforesaid on two levels. First, before the amendment was passed by the 3rd Respondent and secondly, after His Excellency the President submitted his reservations and recommendation to the 3rd Respondent under **Article 115 of the Constitution.**

84. Under **Article 10 (2) of the Constitution,** democracy and participation of people is one of the national values and principles of governance. On the other hand, **Article 118** enjoins Parliament to ***'facilitate public participation and involvement in its legislative business and committees'.***

85. At this juncture, suffice it we consider the emerging jurisprudence on the principle of public participation in policy formulation and legislation. In **Republic vs. Independent Electoral and Boundaries Commission Ex-parte National Super Alliance (Nasa) Kenya & 6 others [2017] eKLR,** the Court held: -

"To paraphrase the decision in Trusted Society of Human Rights Alliance v. The Attorney General & 2 others, Kenyans were very clear in their intentions when they entrenched Article 10 in the Constitution. In our view, they were singularly desirous of cleaning up our politics and governance structures by insisting on certain minimum values and principles to be met in Constitutional, legal and policy framework and therefore intended that Article 10 be enforced in the spirit in which they included it in the Constitution. The people of Kenya did not intend that these provisions be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. They desired these values and provisions should have substantive bite and that they will be enforced and implemented. They desired these values and principles be put into practice. …".

86. In **Law Society of Kenya vs. Attorney General & another (supra)** the Court held: -

"Public participation in governance is an internationally recognized concept. This concept is reflected in international human rights instruments. …

The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 10 of the Constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community as the people must take part in political affairs".

87. Further, in **Robert N. Gakuru & others vs. Governor Kiambu County & 3 others [2013] eKLR,** while citing with approval the decision of the South African Constitutional Court in **Doctor's for Life International vs. The Speaker of the National Assembly & others [CCT12/05] [2006] ZACC 11: BCLR 1399 (CC): 2006 (6) SA 416 (CC),** wherein the Court held: -

"The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the

conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation. … The international law right to political participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who 'themselves should participate in government – though their participation may vary in degree.' … It is expressed in Constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. … It is apparent from the preamble of the Constitution that one of the basic objectives of our Constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law making process …".

88. From the foregoing, it is clear that the centrality of public participation in the legislative functions of the 3rd Respondent cannot be gainsaid. ***Article 118 of the Constitution*** requires that the 3rd Respondent does facilitate public participation in its legislative functions. It must not only ensure that the general public is informed of any intended legislation, but must be involved and participate in the same. There must be deliberate steps by the 3rd Respondent to achieve this Constitutional imperative.

89. From the replying affidavits of **Kennedy Ogeto** and **Josephine Onunga** sworn on 7/8/19, and that of **Michael Sialai** sworn on 8/8/19, the 3rd Respondent published in both the *Daily Nation* and the *Standard* Newspaper of 10/4/19, a notice calling for submission of memoranda in respect of the Bill.

90. In that notice, the 3rd Respondent specified that the memoranda in respect of the proposed amendment to ***the Act*** was to be considered by its *Transport, Public Works and Housing Committee.* The memoranda was to be received not later than 16/4/19 at 5.00 p.m. **Mr. Ogeto** stated that, the said committee received memoranda from seven stakeholders, namely, *the Task Catering Institute, The Coastal Parliamentary Group, Mr. Nyaida Paul Henry, Seafarers Union of Kenya, Hon. Mohamed Faki (Senator Mombasa County), Maritime Industry Associations and the State Department for Shipping and Maritime affairs.* The 3rd Respondent produced copies of some of the memoranda received from the aforesaid 7 stakeholders and others whom it referred to as *Maritime Industry Associations* whose contents the Court noted.

91. From the record, it is clear that that the notice calling for submission of memoranda gave a period of only 6 days for the exercise and that one of the stakeholders who submitted its views was the ***Coast Parliamentary Group,*** which is a caucus of Members of the 3rd Respondent from the Coast region, who urged that public participation be held in Mombasa.

92. It was submitted by the Respondents that the 2nd Petitioner is an unknown cultural organization that deals with the conservation and addresses issues touching on the Mijikenda culture and has nothing to do with the issues herein. On the other hand, the Petitioners contended that they are from Mombasa where the Port is situate.

93. It would appear that the 3rd Respondent gave some opportunity for public participation. However, it is debatable whether the 6 days given for submission of memoranda was reasonable in the circumstances. We are aware that there is no statutory or Constitutional time lines on the length of the notice or how public participation is to be conducted. However, we hold the view that the notice and/or period for public participation should be reasonable, with the notice having sufficient details of the subject matter and the nature of and place for representation.

94. In **Kiambu County Government & 3 others vs. Robert N. Gakuru & others [2017], eKLR,** the Court of Appeal observed: -

"The following principles may be discerned from the quotations reproduced from that case, in summary:

. It is generally accepted that modes of public participation may include not only indirect participation through elected representatives but forms of direct participation.

. … There is a duty to facilitate public participation by ensuring citizens have the necessary information and effective opportunity to exercise the right to political participation.

. …

. Parliament and the provincial legislatures have the discretion to determine how best to facilitate public involvement but the courts have the power to determine the reasonableness of that discretion against the degree of involvement envisaged in

the Constitution. The nature and importance of the legislation and the intensity of its impact are especially relevant.

. Participation must be facilitated where it is most meaningful and the persons concerned must be manifestly shown the respect due to them as concerned citizens.

. Not everyone should be heard orally. The basic element of public participation include the dissemination of information, invitation to participate in the process and consultation on the legislation. …

. Upon a finding that there was breach of Constitutional provision for public participation in legislation, the court is obliged to declare the resulting statute invalid.

. .."

95. The Court of Appeal continued: -

"The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation.

Some illustrations on the nature, extent and amount of public participation that may pass muster are given in that case and are worth setting out, thus: -

'Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process. Thus, Parliament and the provincial legislatures must provide notice of information about the legislation under consideration and the opportunities for participation that are available. …

In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant in determining reasonableness will include, rules if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. ..'

There is more from the case of Matatiele Minicipality and Others vs. President of the Republic of South Africa and others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC):

'This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bills, and may well go beyond the formulaic requirement of the notice or hearing. In addition, the nature of the legislation and the effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. … The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected population is given a reasonable opportunity to have a say'

It is clear, therefore, that there was an attempt to comply with the requirements of the law. The question is whether the objective test of reasonableness was met in the circumstances of this case"".

96. The first observation we make in this case is that, the amendments sought to be effected were very crucial and had far reaching effects. The Port which is situate in Mombasa is both a national resource and a natural heritage. Its operations affect not only those who work thereat, represented by the 1st Petitioner, but also the residents of the entire coastal region, the members of the 2nd Petitioner included.

97. Secondly, one of the stakeholders was the Coast Parliamentary group who urged the Committee to hold its sessions on public participation in Mombasa. This was not heeded. Thirdly, the period of 6 days given for the submission of memoranda was too short in the circumstances of this case. The timelines given were not adequate and it was not demonstrated that there was any serious urgency to justify the short period of 6 days. The consultative meeting held at Sun Africa Hotel, was a ministerial briefing by the 2nd Respondent and did not amount to public participation.

98. From case law and the jurisprudence emerging on public participation, there should be adequate time to enable public participation. Even Parliamentary timelines should not be allowed to defeat the crucial Constitutional principle of public participation. The Parliamentary timelines and standing orders should give way to compliance with the Constitutional dictate.

99. Further, the notice did not contain the nature and effect of the proposed amendments. The necessary information was lacking. The notice published in the *Dailies* of 10/4/19 did not contain any information regarding the proposed amendments to enable first, knowledge as to what was contained therein and second, any meaningful participation in the proposed public participation.

100. Unlike the other notices in the same *Daily Nation* of the same day in respect of ***the Narcotics Drugs and Psychotropic Substances (Control) (Amendment) Bill, 2019, the National Disaster Management (Authority) Bill (National Assembly Bill, 2019)*** and ***The employment (Amendment) Bill (National Assembly) Bill, 2019*** which contained adequate and elaborate explanation and information, the notice of impugned amendment was lacking in detail. The notice was in total breach of the principles set out in the South African Case of **Doctor's for Life International** as approved by the Court of Appeal in the **Kiambu County Government & 3 others vs. Robert N. Gakuru & others (supra).**

101. We have also looked at the copies of the memoranda submitted by the so called ***maritime industry associations***. Not only do they look similar in print and content and form, they seem to have been produced by the same person. In the natural course of events, it is highly unlikely that **Mohamed Omari Suleiman and Abdalla Mohamed Mwabungale** of **Mbita Point Boat Operators** in Homa Bay, the **National Industrial Training Authority** of Nairobi, **Transporters Association** of Mombasa and **Beach Cleaners Association** in Kwale and Lamu, would have same wordings and use similar fonts in their respective memoranda.

102. For the foregoing reasons, we are of the opinion that although there was some attempt to hold some modicum of public participation, the same was not reasonable in the circumstances. The notice and period given was too short. There was no information given regarding the proposed amendments to allow any meaningful or any public participation at all. By publishing the notice in the Dailies and giving a short period of 6 days, the 3rd Respondent cannot purport to have satisfied the constitutional requirement of facilitating public participation.

103. The foregoing notwithstanding, what was contained in the Bill was a proposed introduction of **Section 4A** which provided as follows: -

"4A Notwithstanding any other provision of this Act, the Cabinet Secretary may, on the recommendation of the Authority, by notice in the Gazette and subject to such conditions as may be appropriate, exempt any Government entity or enterprise from any provision of this Act where such exemption is in the public interest and in furtherance of Government policy."

This is what was specifically contained in the Bill that was published on 29/3/19 and subjected to the purported public participation.

104. However, after deliberations, the Committee found the proposed amendment to be too substantive in nature because of the raft powers that would have been placed in the hands of the 2nd Respondent, that it rejected the same. Instead, it proposed amendments to **Sections 2 and 16 of the Act** by introducing a *'national shipping line'* and excepting the *'national shipping line'* from the provisions of **Section 16 (1) of the Act.** That *per se* did not change the nature and texture of the Act.

105. When the Bill was sent to the President for assent, he exercised his powers under **Article 115 of the Constitution** by noting his reservations and referred it back to the 3rd Respondent for reconsideration vide his Memorandum dated 18/6/19. The President's reservations were considered and approved by the relevant committee on 27/6/19. The same was subsequently passed by the 3rd Respondent and assented to, and published on 9/7/19. The final text that was passed and assented to was in the following terms: -

"(1A) The provisions of subsection (1) shall not apply to a shipping line owned or controlled by the Government".

106. Two issues arise from that act of his Excellency the President. Firstly, the Petitioners contended that by the nature of his reservations and recommendation, there should have been public participation on the same. Secondly, the text of His Excellency's reservations suggests and indeed confirms that the amendment that was published and submitted for public participation is completely different from what was intended and finally enacted as the amendment to **Section 16 of the Act.**

107. The Respondents quite rightly submitted that, it is not necessary to submit the President's reservations and recommendation under **Article 115 of the Constitution** to public participation**.** This is borne by **sub-article (2) of Article 115** which limits the procedure to Part 4 of Chapter 8 of the Constitution. It should be recalled that public participation to parliamentary legislation is under **Article 118** which is under **Part 5 of Chapter 8 of the Constitution.** (See also the Court of Appeal's decision in **Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 others [2018]).**

108. However, the present case is different from the case of **Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 others (supra).** In the **Pevans Case (supra),** the President's reservations were that the National Assembly applies a uniform percentage of 35 instead of the various percentages contained in the Finance Bill that had been submitted to him. That reservation and recommendation did not change the letter and spirit of what had been proposed in the original bill and subjected to public participation.

109. In the present case, the reservations and recommendation changed the entire nature, texture, letter and spirit of not only the amendment contained in the Bill, but the Act itself.

110. What was contained in the Bill was an amendment to introduce **Section 4A** and allow the 2nd Respondent to exempt any Government entity from the application of any provision of the Act where such exemption is in the public interest and in furtherance of Government policy. The amendment passed by the 3rd Respondent retained the restriction in **Section 16 of the Act** of any ship owner, except one wholly owned by the government from, *inter-a-lia*, operating any port in Kenya. However, the President's reservations and recommendation was to the effect that, a body not wholly owned by government but in which the government has a majority shareholding could control and operate a port in Kenya.

111. The Memorandum by the President dated 18/6/19 stated, *inter-a-lia*: -

"The amendment proposed to the Act initially read as follows-

4A. …

The intention in proposing the amendments was to empower the Cabinet Secretary to exempt any Government entity or enterprise from the provisions of the Act, including the provisions of section 16(1).

There was also a proposed specific amendment to section 16 to exempt the Kenya National Shipping Line from the restrictions imposed under section 16(1). (Underlining ours)

Section 16 (1) of the Act imposes a restriction on shipping lines from providing certain services, including service as ...

The proposed amendments were, however, rejected by the House and instead it introduced a new subsection 16(1A) as follows-"

(1A) The provisos of subsection (1) shall not apply to a shipping line owned or controlled by the Government."

112. His Excellency the President proposed that Section 16 (1A) be amended to read: -

"(1A) The provisions of subsection (1) shall not apply to a shipping line owned or controlled by the Government"

113. Based on the foregoing it would appear that the reservations by the President was based on a proposed legislation which had

neither been the subject of debate in the 3rd Respondent nor had undergone public participation.

114. It is the introduction of the words ***"… or controlled"*** that irked the Petitioners. The irritation of the Petitioners by the introduction of the said words is understandable as it has far reaching consequences. It allows an entity where the government may have nominal control to undertake the services set out in **Section 16(1) of the Act** which had hitherto been restricted. It is for this reason that the Petitioners, albeit mistakenly contended that the CT 2 had been privatized.

115. From the foregoing, it would appear to us that His Excellency the President had in mind a proposed amendment that was different from that contained in the Bill and submitted for public participation. In our further view, His Excellency was clear in his mind that what was to be contained in the Bill should have included *'a specific amendment to Section 16 of the Act to exempt the Kenya National Shipping Line from the restrictions imposed under section 16'*. Unfortunately, this was not the case. What was published and submitted for the purported public participation was **Section 4A.**

116. In this regard, to the extent that the reservations and recommendation of His Excellency the President were not part of what was published and subjected to the purported public participation, the same could not have been dealt with under Part 4 of Chapter 8 without the application of **Article 118 of the Constitution.**

117. Accordingly, it is our opinion and we so hold, that due to the nature and import of the proposed amendment by His Excellency the President, his reservations and recommendation should have been subjected to public participation before being enacted into law.

118. n view of the foregoing, we hold that the amendment and introduction of ***Section 16 (1A) to the Act*** was in violation of **Articles 10 and 118 of the Constitution.** To that extent, the said amendment is unconstitutional, null and void and of no consequence.

Whether it was proper to amend Section 16 of the Act through a *Statute Law (Miscellaneous Amendments) Act, 2019*

119. The next issue was that the amendment of **Section 16** through a statute law (miscellaneous amendments) bill**,** was irregular. That the amendments were substantive and not merely minor, non-controversial and/or generally house-keeping amendments. The Respondents and the 1st to 4th Interested Parties were of the opinion that there was nothing wrong in the amendments being contained in a statute law (miscellaneous amendments) bill.

120. In addition, Mr. Nyamodi submitted that since this issue was never raised in the petition or in the evidence on record and was first raised by Mr. Ochieng in his submissions, it is not open for our consideration. Mr. Nyamodi referred us to the decision of this Court in **Clips Limited vs. Brands Imports (Africa) Limited formerly named Brand Imports Limited [2015] eKLR** wherein the Court held that new issues cannot be raised in submissions.

121. We have considered Mr. Nyamodi's objection and the decision he referred us to. In that decision, the Court held: -

"However, it is trite law that new issues cannot be raised in submissions. Korir J in the case of Republic vs. Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another [2014] held that:

The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."

Furthermore, it is trite law that documentary evidence cannot be annexed to submissions and consequently the Court ought to ignore the same. The Court of Appeal in Douglas Odhiambo Apel & another vs. Telkom Kenya Limited Civil Appeal No. 115 of 2006, upheld the trial Court's decision to disregard evidence that had been attached to submissions."

122. It is clear from the foregoing that, the Court was dealing with new issues that were raised by way of new material in the

submissions. In the present case, the issue raised in the petition was that the process of the impugned amendment was unconstitutional. The evidence of this unconstitutionality is abundantly before the Court by way of the petition, the affidavits as well as the Bill itself.

123. Further, the relevant Committee of the 3rd Respondent itself addressed the issue in its report dated 05/06/2019 as follows:

"4 COMITTEE OBSERVATIONS

The committee while considering the Bill made the following key observations;

1. The proposed amendment is substantive in nature since it seeks to allow the Cabinet Secretary to exempt an organization from the application of the Act hence ought not to be contained in a Statute Law (Miscellaneous) Amendment Bill, whose purpose is to make minor amendments to existing statutes. The merits of the proposed amendment should be considered in a substantive amendment Bill to the Merchant Shipping Act, No. 4 of 2009. …"

124. From the foregoing, it is clear that the 3rd Respondent raised this issue in the Committee's observations which were placed before this Court by both the 2nd and 3rd Respondent. This Court cannot therefore shut its eyes to the same.

125. Statute law (miscellaneous amendments) bills are sometimes referred to as *Omnibus Bills.* They ordinarily contain amendments to several Acts of Parliament. It is a law that covers a number of diverse and unrelated subjects. It is for expediency, to save Parliamentary time.

126. In **Law Society of Kenya vs. Attorney General (supra)** the five Judge bench observed: -

"It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments."

127. In **Okiya Omtatah Okoiti vs. Communications Authority of Kenya & 21 others [2017],** the Court held: -

"That this (minor non-controversial amendments) is the norm is clearly discernible from the practice adopted in most jurisdictions, though the practice is not consistent. According to the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 21, October, 2007, pp. 5-6:

'An omnibus bill is an avenue for making general housekeeping amendments to legislation. It is designed to make only relatively minor, non-controversial amendments to various acts and to repeal acts that are no longer required. Omnibus bills assist in expediting government business by reducing the number of separate amendment bills that deal with relatively minor amendments and repeals. They also help to weed out spent or redundant legislation from the statute book. The Department of the Premier and Cabinet has overseen the preparation of the bill to try to ensure that amendments about which there is some contention or complexity, or that make some substantive change to the law are not included.'

This position is similar to that adopted by the Canadian Legislature in regard to omnibus bills as expounded in *Canadian Miscellaneous Statute Law Amendment Program* ***that only minor, non-controversial amendments are allowed to be made to a number of federal statutes at once in one bill."***

128. Finally, in **Josephat Musila Mutual & others vs. Attorney General & 3 others [2018] eKLR**, the Court held: -

"In that regard therefore, statute Law (Miscellaneous Amendments) bill, cannot be used to make serious or substantial amendments to a statute or legislation as parliament did in this case of the Auctioneers Act, (No.5 of 1996). Looking at the amendments effected through this Statute Law (Miscellaneous Amendments) Act, they were quite substantial and affected the composition of the Auctioneers Board at any one time should circumstances necessitate change of status of a member or members of the Board as contemplated by section 3(3) of the Act."

129. It is clear therefore that from available jurisprudence, statute law (miscellaneous amendments) bills are for minor non-contentious amendments such as grammar, correction of errors and such simple matters. Such bills should not contain substantive and important legislation which should be contained in independent bills.

130. Looking at the amendment effected by **Section 16 (1A),** it is evident that the same cannot be said to have been minor or non-controversial. It was substantive in nature and had far reaching effects on Maritime operations in this country.

131. To this Court, such a change in policy through legislation would have required robust debate in the National Assembly accompanied by effective and satisfactory public participation through a substantive separate independent bill. As already held, because the amendment was contained in an omnibus statute law (miscellaneous amendments) bill, the notice in the Dailies of 10/4/19 for public participation was lacking in detail as to its intention and effect.

132. In this regard, we find that the 3rd Respondent should not have included the impugned amendment in the omnibus ***Statute Law (Miscellaneous Amendments) Bill, 2019.*** That being the case, the amendment cannot stand.

Whether the Memorandum of Understanding is unconstitutional

133. We now turn to the issue of the MOU. The Petitioners claim that through newspaper reports and advertisements, social media and online reports and writings on the MOU, they came to know that the Government had through the 2nd Respondent entered into the MOU with the 2nd Interested Party over the privatization and/or transfer of operations and management of CT2. The Petitioners allege that the MOU is shrouded in secrecy and lack of transparency and there was no public participation. The Petitioners seek a declaration that the MOU is illegal and unconstitutional for lack of public participation. The Petitioners are apprehensive that if allowed to stand the MOU will result in job losses. It is also a threat to livelihoods of the people of Mombasa and of Kenya generally. The Petitioners accuse the Respondents of exercising their mandate contrary to the provisions of the Constitution.

134. The 2nd Interested Party acknowledged the existence of the MOU which was entered into between the 2nd Respondent and itself on 16/8/18. The purpose of the MOU was to strengthen KNSL as a competitive operator in the maritime sector by utilizing the 2nd Interested Party's worldwide shipping network, capacity and capability in port and ship operations.

135. The 2nd Respondent further averred that the Government through its agencies, enters into MOUs all the time. The expectation that the public ought to be involved in the negotiations, drafting and selection of parties for such MOUs is not feasible. The 2nd Respondent denies that it exercised its mandate contrary to Articles 73, 201 and 232 of the Constitution.

136. It is noted that the much discussed MOU is not before this Court as the Petitioners have not filed the same. Although none of the parties deny its existence, the Court cannot say with any degree of certainty the date or indeed the parties thereto. The terms and conditions are also not known to the Court. The Petitioners who are challenging the MOU have stated that they too have not seen the same. The Petitioners' claim that the CT2 has been privatized and that as a result jobs will be lost, are based on newspaper reports and advertisements, social media and online reports and writings on the MOU.

137. The question this Court now has to ask itself is whether the Petitioners can authoritatively ask the Court to declare unconstitutional a MOU they have neither seen nor are privy to. Can mainstream and social media reports form the basis for seeking the declaratory orders the Petitioners seek herein" Further, can this Court declare the MOU which has not been placed before it unconstitutional" In **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2015] eKLR**, the Court of Appeal dealt with a document that had been marked for identification but not produced as an exhibit and this is what it said:

"Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

138. By parity of reasoning, the MOU not being produced before the Court, is only hearsay, untested and an unauthenticated account. A party wishing the Court to pronounce itself on a document must produce it for the Court to consider the same. The MOU

is not part of the record and the Court cannot allow itself to fall into the error of making any declarations thereon as sought by the Petitioners. For the Court to purport to consider and make a pronouncement on an MOU that has not been produced before it would be to act contrary to its character and to enter upon the realm of speculation.

139. Further, it is trite law that he who alleges must prove. Section 107 of the Evidence Act provides:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

140. The Petitioners would want this Court to believe that the MOU infringes upon the Constitutional rights of the persons they represent. The burden of proving the allegations lay squarely upon the Petitioners. In **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR,** the High Court stated at paragraph 55 and we agree:

"It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the Evidence Act (Cap 80) provides that "*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist*". It is therefore the duty of the person who asserts that there is a breach of section 44 of the Banking Act to prove by evidence that that indeed is the case. That is why section 109 of the Evidence Act again provides that *"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"*

141. In order to discharge their burden of proof, it was incumbent upon the Petitioners to produce the MOU for the Court's perusal, consideration and determination as to its Constitutionality or otherwise. As to why the MOU has not been filed, the Petitioners state that a request for a copy of the MOU was made to the 1st Interested Party which however directed them to the parent ministry. The 2nd Respondent denies ever receiving a request for the MOU from the Petitioners. Clearly no effort was made to obtain a copy of the MOU from the parent ministry. Even if the ministry had declined to give a copy of the MOU to the Petitioners after request, that would not have been the end of the road for them. It was still open to the Petitioners to apply to this Court for the production of the MOU under Article 35 of the Constitution and the Access to Information Act No. 31 of 2016. It is therefore not enough for the Petitioners to state that they made a single attempt to obtain a copy of the MOU. The Court finds that no effort to obtain the MOU has been demonstrated to its satisfaction. The Petitioners cannot therefore be heard to complain that they were denied access to the MOU. Without having sight of the MOU therefore, the Court is unable to make a determination thereon one way or the other. The Petitioners have failed to discharge the burden of proof placed upon them by Section 107(2) of the Evidence Act.

142. The Petitioners' opposition to the MOU is that CT 2 will be privatized. To the Petitioner, the operations of CT 2 are best left to 1st Interested Party being a state corporation which is more concerned with *"maintaining big employment as a way of creating and sustaining jobs for the citizens than maximization of profits"*. The 2nd Interested Party being a private foreign company driven by profit will proceed with automation of operations at CT 2 thereby leading to loss of over 4,000 jobs. For the 2nd Respondent, Mr. Kamau Karori submitted that the Government of the day has the legitimate mandate to formulate policy.

143. The doctrine of separation of powers is central to our Constitution. The 3 arms of government that is the Executive, Legislature and the Judiciary are all bound by the doctrine. It is accepted that although the arms of government are interdependent, forming one unitary government, each is independent, has a specific mandate and none should encroach on the territory of the others. In **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the Court of Appeal had this to say:

"It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a pre-commitment in our Constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:

"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our Constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the Constitutionality of all governmental actions..."

144. It is to be noted that the formulation and implementation of policy are within the province of the Executive. The right of the Executive to formulate policy is anchored in the Constitution. In **Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 others [2016] eKLR**, the Court of Appeal stated:

"With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In Marbury -vs- Madison – 5 US. 137 it was stated that:

"The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion."

The Court went on to state:

"It is our considered view that under the political question doctrine, a court has no jurisdiction to make orders relating to policy formulation or give guidelines on who should participate in the formulation of government policy."

145. It is clear from the foregoing that Courts generally have no role in policy formulation and implementation. That is the province of the Executive. Courts may however intervene and interfere with the Executive's role where the rights of individuals are denied, violated or infringed or threatened as provided in Article 23(1) of the Constitution:

"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

146. The Constitution of Kenya is the supreme law of the land and the Executive must carry out its mandate within the limits prescribed by the Constitution. Where the Executive acts outside these limits, the Courts are mandated by the same Constitution to inquire into the Constitutionality of the Executive's actions. This was the holding by in **Law Society of Kenya vs. Attorney General & another [2016] eKLR**, where the Court stated:

"191. We hold that this Court has the power to enquire into the Constitutionality of the actions of Parliament notwithstanding the privilege of inter alia, debate accorded to its members and its proceedings. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and Parliament must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.

192. In our view the doctrine of separation of powers must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the Constitutional principles the doctrine must bow to the dictates of the spirit and the letter of the Constitution…"

147. In the instant case, the 2nd Respondent has stated the object of the MOU is to revive the KNSL through which Government would achieve the critical Blue Economy agenda; improve port operations efficiency and make the Kenyan coastline and the port of Mombasa the region's leading transit and transshipment hub; to turn the Kenya National Shipping Line into a robust shipping line with the goal of being amongst the top 5 at the port of Mombasa; increase the country's competitiveness and reduce the cost of doing business; employment creation.

148. Our view is that the Executive has the mandate to improve port operations and should have the unfettered discretion and be free

to engage with any party and enter into strategic partnerships and collaborations for the purpose of improving its performance in the maritime sector. This must, however, be done within the confines of the Constitution as stated in foregoing paragraphs.

149. The Petitioners have not demonstrated that the MOU has resulted in the violation of any Constitutional principle or denial, violation, infringement or threat to their fundamental rights. For this Court to interfere with the MOU without proof of such violation would therefore be to encroach on the special mandate of the Executive without any legal justification.

150. The Petitioners have argued that the MOU was entered into before Section 16(1) of the Merchant Shipping Act was amended. The Petitioners aver that the Act having been amended subsequent to the MOU cannot therefore apply retrospectively to validate the MOU, or that the MOU cannot be anchored on the said legislation.

151. We have found that the process of enactment of Section 16 (1A) of the Act was unconstitutional, and we have accordingly impugned the same. Even if our finding on the constitutionality of the aforesaid amendment was to the contrary, the said amendment of Section 16 (1A) would still have run into headwinds because of the principle of retroactivity. The issue of retrospective application of the law was settled by the Supreme Court in the case of **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR** as follows:

"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

152. The general rule laid down by the Supreme Court is that all statutes are *prima facie* prospective unless they are declaratory or relate to procedure or evidence. Retrospective effect shall only be given to statute if it is evident by express words or by necessary implication that this was the intention of Parliament. The amendment of Section 16(1) of the Act included a new subsection 16(1A) as follows:

"(1A) The provisions of subsection (1) shall not apply to a shipping line owned or controlled by the Government".

153. From the wording of the new subsection, the amendment is not declaratory. It does not relate to matters of procedure or evidence. Further, nothing in the amendment either by express words or necessary implication would lead one to draw the conclusion that Parliament intended that retrospective effect be given to Section 16(1A) of the Act.

154. In the premises, we find and hold that no document, agreement or instrument executed before the coming into effect of Section 16(1A) of the Act may be anchored in the said section.

Disposition

155. In conclusion we find and hold that the Petitioners have proved their petition on the balance of probability. We accordingly allow the petition in the following terms:

(i) A declaration does issue that the amendment to Section 16 of the Merchant Shipping Act to introduce Section 16 (1A) violates Articles 10 and 118 of the Constitution. To that extent the said amendment is unconstitutional, null and void and of no consequence.

(ii) This being a matter of public interest, parties shall bear own costs.

Dated, Signed and Delivered at Mombasa this 4th day of October,

2019.

E. K. OGOLA A. MABEYA M. THANDE

JUDGE **JUDGE** **JUDGE**