

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL PETITION NO..... OF 2022

IN THE MATTER OF ARTICLES 22, 23, 27, 35, 43, 10, 47, 227 AND 260 OF THE
CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 16 OF THE MERCHANT SHIPPING ACT, 2009

AND

IN THE MATTER OF SECTION 8, 11 AND 12 OF THE KENYA PORTS AUTHORITY ACT

AND

IN THE MATTER OF SECTIONS 4, 5, 6 OF THE PUBLIC PROCUREMENT & ASSET
DISPOSAL ACT, 2015

BETWEEN

HAKI IN AFRICA TRUST.....PETITIONER

AND

- | | |
|---|----------------------------|
| 1. THE KENYA PORTS AUTHORITY..... | 1 ST RESPONDENT |
| 2. KENYA NATIONAL SHIPPING LINE..... | 2 ND RESPONDENT |
| 3. MEDITERRANEAN SHIPPING COMPANY SA..... | 3 RD RESPONDENT |
| 4. CABINET SECRETARY, TRANSPORT & INFRASTRUCTURE, HOUSING & URBAN
DEVELOPMENT..... | 4 TH RESPONDENT |
| 5. THE ATTORNEY GENERAL..... | 5 TH RESPONDENT |

AND

- | | |
|--|----------------------------------|
| 1. JAPAN INTERNATIONAL COOPERATION AGENCY..... | 1 ST INTERESTED PARTY |
| 2. A.P. MOLLER - MAERSK..... | 2 ND INTERESTED PARTY |
| 3. CMA CGM S.A..... | 3 RD INTERESTED PARTY |
| 4. PACIFIC INTERNATIONAL LINE..... | 4 TH INTERESTED PARTY |
| 5. DP WORLD..... | 5 TH INTERESTED PARTY |

PETITION

A-PARTIES

1. The Petitioner is a human right organisation registered as a trust in accordance with the laws of Kenya and whose address for purpose of these proceedings is Aboubakar, Mwanakitina and Company Advocates, Hassanali Building, 1st Floor, Nkrumah road, P.O. Box 90469-80100, Mombasa. Email: yusufaboubakar@yahoo.com Mobile: +254-723-339472.
2. The 1st Respondent is a Statutory body, created pursuant to the provisions of Section 3 of the Kenya Ports Authority Act (*cap 391*) Laws of Kenya.

3. The 2nd Respondent is a limited liability company incorporated in Kenya for purposes of engaging in maritime transport business and other related businesses.
4. The 3rd Respondent is a company whose address is **12-14 CHEMIN, RIELL, 1208 GENEVA SWITZERLAND**, and operates in Kenya as Mediterranean Chipping Company (**MSC**) engaging in maritime transport business and other related businesses.
5. The 4th Defendant is the Ministry of Transport & Infrastructure, Housing & Urban Development, in the Government of Kenya in charge of the maritime department.
6. The 5th Respondent is the Chief legal advisor to the Government of Kenya and is therefore sued for and on behalf of the said 4th Respondent.
7. The 1st Respondent, as a creature of Statute, is mandated, among other functions to:

(a) maintain, improve and regulate the ports that are specified in that Act.

(b) construct, operate and maintain beacons and other navigational aids

(c) construct new ports

(d) to provide such amenities or facilities for persons making use of the services performed or the facilities provided by the authority as may appear to the board to be necessary or desirable.

B-FACTS

8. **That** from the functions stipulated by the Act, it is apparent that the 1st Respondent is not mandated to cede any of these functions to any other persons, whether foreign or local.
9. By the same token, neither the 2nd nor the 3rd Respondent is empowered or authorized by any law to conduct the business of the 1st Respondent, or take over operations or management of any Port business that is characteristically reserved by law, in particular, The Kenya Port Authority Act, to be performed by the 1st Respondent.
10. In similar manner, the 1st Respondent is not authorized or mandated by the creating Instrument, namely the Act, to cede to, or in any manner hand over its functions, operations and management of the Port of Mombasa, or any other Port, to either the 2nd or 3rd Respondents, or any other person whatsoever, whether an individual or corporate, foreign or local.
11. On the 16th August 2018, the 4th Respondent, namely, *The Cabinet Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development*, entered into a **Memorandum of Understanding (MOU)** with the 3rd Respondent, whose purpose is, if implemented, to coerce the 1st Respondent to cede its functions and operations as a Port Operator to the 2nd and 3rd Respondent in respect of the operations and management of a newly constructed **Container Terminal 2, Berth Number 22**, at the Port of Mombasa. The Petitioner also believes that there are further plans to cede operations and management of the other parts of the Port of Mombasa including the Special Economic Zone at Dunga

Kundu, the Port of Lamu and Kisumu and the Inland Container Depots operated or managed by the 1st Respondent to other Third Parties.

12. For purpose of completeness, it is provided in the said MOU that the 3rd Respondent is to acquire shares in the 2nd Respondent, *Kenya National Shipping Line* through a subsidiary of the 3rd Respondent known as "**HEYWOOD**".
13. The 1st Respondent's mandate, powers and authority as a Port Operator are wholly compromised by **Article 2** in the MOU which gives mandatory directives in this manner:

(i) To review their shareholding arrangement of KNSL and provide MSC and Heywood an opportunity to review the corporate, financial and accounting records and business affairs of KNSL (to the extent they consider necessary);

Then Article 1(ii) provides as follows:

(ii) To provide Heywood an opportunity to convert its economic interest in KNSL to a formal shareholding and to complete the allocation of necessary shares in KNSL to the shareholders to increase Heywood's shareholding in KNSL into not less than 47%.

14. It is apparent that the Directives given in *Article 2(i)* and the Reservations provided for in *Article 2(ii)* of the MOU do not allow the 1st Respondent any room to either make any management decisions on matters concerning the newly built Container Terminal 2 or to make any independent decisions in respect thereof. It is clear from this that this would also apply to any other transactions the 1st Respondent intends to undertake.
15. The total net effect of the intentions of the MOU is to provide the 3rd Respondent, a foreign owned Shipping Line, to not only own a Container Terminal at the Port of Mombasa under cover of the 2nd Respondent, but to also take over the decision-making process at the Port concerning Management and Operations of the Port of Mombasa.
16. In addition to the matters pleaded above, the Petitioner avers that the subject MOU also allows the 3rd Respondent, in conjunction with the 2nd Respondent to penetrate further inland, beyond the borders of the Port. This will be realized through Article 2(ii) which allows the 3rd Respondent to convey all government cargo under auspices of the 2nd Respondent. For avoidance of doubt, this right has been reserved in this manner:

(iii) reserving all government cargo for carriage by KNSL.

17. In the circumstances, the 2nd & 3rd Respondents will not only be active Port Operators at Container Terminal 2, to the exclusion of the 1st Respondent, but they will also undertake logistical services of transporting cargo from the port to its destination in the hinterland.

C-EFFECT

18. A visual appraisal of this scenario will then be seen and reflected as follows:

(a) As a Shipping Line, the 3rd Respondent will deliver, through its ships, cargo to the Port of Mombasa.

(b) The same 3rd Respondent, as Operator, will offload and store cargo at a terminal reserved for it, through KNSL, which has its operations at the Port.

(c) The 3rd Respondent will then offer logistical and other transportation means of that cargo from the Port to its destination in the hinterland.

19. The overall consequence of implementing this MOU will be to occasion to great economic loss to the rest of the citizens. The petitioner believes that such conduct violates **Article 43** of the Constitution since the conduct outlined above fully relegates the rest of the players in the industry to economic peripheral spheres. This discriminates against them by creating a virtual monopoly in favour of the 2nd and 3rd Respondent.

20. It is also instructive, and averred by the Petitioner that such conduct as is described above **discriminates** against all other persons who have invested in the logistical industry of moving goods from the Port of Mombasa to final destination. This contravenes the provisions of **Article 27** of the Constitution.

21. Further, a perusal of Article 5 of the MOU reveals that the same intentionally violates the provisions of **Article 35** of the Constitution. The article says;

Negotiate and draft agreement to enable KNSL operate from the Port of Mombasa for a period to be agreed. In negotiating the agreement, parties should agree on the terms and conditions that should include inter alia, the duration and any payable fees, consider and factor in the economic analysis and projections for operating from the Port to ensure that the project is bankable for KNSL, taking into account the relevant parameters such as required capacity and other specifications, projected volumes, cost of development, lease of the land, royalties in lieu of tariffs, installed equipment in the area of operation, additional equipment programme, yard capacity, maintenance, manpower requirements, among others.

20. To buttress further breach of Article 35 of the Constitution, Article 7 of the MOU provides thus:

(a) *Each party shall (and shall ensure that each of its representative shall) maintain the existence of this MOU and any non-public information of the other party (hereafter, Confidential Information) in confidence and not disclose the Confidential Information to any person, except as this clause permits or as the other party approves in writing.*

(b) *Neither party (nor any of its representatives) shall make any announcement or issue any circular regarding the existence or the subject matter of this MOU without the prior written approval of the other party.*

21. For avoidance of doubt, the construction of the newly completed **Container Terminal 2** was undertaken through loans provided by the **Japan International Cooperation Agency (JICA)**. Such loans are not without stringent Terms and conditions attached thereto and the obligation to pay these back remains out of public funds.

22. For reasons of the above, it behoves the 1st Respondent not only to fully observe the **Constitutional dictates** given at **Chapter 12, Part 6**, on control of public money but also

requires that the obligations of prudent and efficient financial management with integrity as prescribed by Article 10 are observed stringently with complete transparency. For this reason, Article 227(1) of the Constitution provides as follows:

(i) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

23. There is no doubt that the 1st Respondent is a state organ within the meaning of Article 260 of the Constitution particularly that it reports to the 4th Respondent. For this reason, the Petitioner avers that:

(a) The secrecy surrounding the entry and execution of the Memorandum of Understanding directly contravenes the transparency required by Article 227(1) reproduced above.

(b) The acquisition of shares in Kenya National Shipping Line by Mediterranean Shipping Company was done in a veiled opaque and less than open manner.

(c) It is not known how 47% of shares in Kenya National Shipping Lines was given up by their initial shareholders, and when and in what manner or how they were purchased by Mediterranean Shipping Company.

(d) The effect of the matters in (b) and (c) above is that these offloading and purchasing of 47% shares by the 3rd Respondent in the 2nd Respondent was done in a manner that was not fair, equitable, transparent, competitive and or cost effective.

(e) Whether the 1st Respondent had any rights of pre-emption and if so, how these were waived.

All these were and remain deeds that are contrary to Article 227(i) of the Constitution.

24. In addition to the shortcomings pointed out above, the Petitioner states that the existence of the MOU is acerbic and straight evidence that there was no procurement done, no tendering, for the 1st Respondent to give up its possessory and operational rights over the newly built **Container Terminal 2**. It appears that the same fate is intended for the other areas referred to in paragraph 9 above to the detriment of the Kenyan Public and in order to benefit private economic interests.

25. The effect of the failure to call for tendering as pleaded above is that the intended handing over of Container Terminal 2 to the 2nd and 3rd Respondents has been done unfairly, without any transparency, without competition, equity, and at an unknown cost, even assuming that there was any value given by the 2nd & 3rd Respondents for that acquisition.

26. The sum total of these matters is that there has been **unlimited** and **flagrant** breach of the provisions of **Article 227** of the Constitution, as well as;

(a) The Procurement & Assets Disposal Act.

(b) The Public Finance Management Act.

These monumental and gigantic breaches of both the *Constitution* and the derivative *Statutory* enactments require to be corrected.

27. The Petitioner also avers that the conduct of the 3rd & 4th Respondents in their intention to take over the activities and operations of **Container Terminal 2** from the 1st Respondent, to be operated by the 2nd and 3rd Respondents, has stoked the silence of Japan International Cooperation Agency, the financier, to recall their financial outlay on the project.

28. For this reason, on the **25th October 2021 JICA** wrote to the 1st Respondent and stated, among matters, as follows:

JICA would like to remind Kenya Ports Authority (hereinafter referred to as "KPA") the following;

(1) Applicable General Terms and Condition for respective Loan Agreement (hereinafter referred to as "L/A" for the Development of the Berth 20, 21, 22 and DK-1.

(A) JICA provided the following loan to KPA and the Government of Kenya for the development of Mombasa Port with applicable General Terms and Conditions (hereinafter referred to as ("GTC") as follows:

(2) Requirement for Transfer of Port Operation in accordance with GTC

A. According to the respective GTC, the Borrower is required to obtain no objection from JICA when property or asset financed by JICA is to be sold, leased, transferred, assigned, or otherwise disposed as following:

Loan Agreement	Applicable GTC	GTC Article (Note)
KE-P25 dated November 20, 2007	GTC version October 1999	Article VI Section 6.01 (d)
KE-P30 dated March 9, 2015	GTC version April 2012	Article VI Section 6.01 (d)
KE-P35 dated February 27, 2022	GTC version November 2014	Article VI Section 6.01 (d)

B. Therefore, if KPA or National Treasury and Planning has intention to transfer the operation and maintenance of Berth 20, 21, 22 and DK-1 to third party, please be noticed that following entities are required to obtain prior consent from JICA.

At paragraph (3), that letter continued as follows:

(3) According to the respective GTC, Borrower are required to provide details of all plans which would result in any important modification of Project promptly upon formulation of such plans as following:

That at Clause (B) JICA stated that:

(B) "JICA would like to clarify to the Borrower and Guarantor that JICA considers any procurement of port operation and maintenance provider to be important modification to be notified to JICA as above (3) A.

(4) Requirement for Responding to JICA'S inquiry;

(A) According to the respective GTC, Borrower are required to furnish JICA with all such information, which JICA may reasonably request, for sound administration of the loan as following.

(B) JICA would like to request the Borrower and Guarantor to disclose any information or plan, if any, in terms of plan for operation and maintenance based on the rights of JICA and requirement of the Borrower as we reminded as per above (4) A.

These matters are more humbly shown in detail at paragraphs 7 to 9 of my exhibits attached to the Supporting Affidavit.

29. In addition to the summary given above, being extracts from pages 7 to 9 of my exhibits hereto, JICA gave to the 1st Respondent excerpts of the **Loan Agreement** between the parties. These excerpts show the mode and manner in which the 1st Respondent was and still is in the process of breaching that Loan Agreement.

30. In particular, JICA pointed out to the 1st Respondent that if it, *the 1st Respondent*, without the Consent of JICA,

(ii) sold, leased, transferred, assigned or otherwise disposed of any property or assets financed wholly or in part, out of the proceeds of the loan,.."

then the 1st Respondent would be deemed to be in breach of the Loan Agreement, with the consequence that the entire sum financed becomes due and payable immediately.

31. In those excerpts, the 1st Respondent was informed as follows:

Sections 6.01. Remedies of the BANK

When any of the following shall occur and be continuing, the BANK may by notice to the Borrower and the Guarantor, if any, suspend in whole or in part the rights of the Borrower, and/or demand that the Borrower and/or the Guarantor, if any, fully remedy whichever of the following has occurred. If the following shall have continued for a period of thirty (30) days from the date of such notice, the BANK may terminate disbursement and/or may declare all the principal then outstanding, with the interest and any other charges thereon, to be due and payable immediately, and upon such declaration such principal, interest and other charges shall become immediately due to payable:

(c) *The Borrower or the Executing Agency shall, without the consent of the BANK, have (i) assigned or transferred, in whole or in part, any of its obligations arising under the Loan Agreement; or (ii) sold, leased, transferred, assigned, or otherwise disposed of any property or assets financed wholly or in part out of the proceeds of the Loan, except with respect to transactions in the ordinary course of business which, in the opinion of the Bank, (A) do not materially and adversely affect the ability of the Borrower to perform any of its obligations under the Loan Agreement or to achieve*

the objectives of the Project, or the ability of the Executing Agency to perform any of its obligations arising under, or entered into pursuant to, the Loan Agreement or to achieve the objectives of the Project; and (B) do not materially and adversely affect the financial condition or operation of the Borrower or the Executing Agency.

32. The effect of the 1st Respondent ceding its operations of **Container Terminal 2**, financed by JICA, to be operated by the 2nd & 3rd Respondents, has the unfavourable effect of creating the consequences outlined in the foregoing paragraphs.
33. Effectively, the 1st Respondent, being a public body, has invested public funds in the construction of **Container Terminal 2**, only to turn around and hand over the same to private operators, including the 3rd Respondent, which is a fully foreign owned company.
34. If the scenario painted above is allowed to be implemented, that will mark the beginning of **monumental losses of public funds** through the 1st Respondent, to find their way into the hands and pockets of private entities including a foreign International Shipping Line.
35. The Government of Kenya, through the 4th Respondent, and the 2nd Respondent is determined to have the Terms and Conditions contained in the MOU enforced and implemented, with the resultant consequences that have been outlined above. This needs to be put in check by our Court.

D-PRAYERS


REASONS WHEREFORE the Petitioner prays for the following Orders namely:

- (a) A declaration that the Memorandum of Understanding dated 16th August 2018 entered into between the 3rd Respondent, Mediterranean Shipping Company SA and the 4th Respondent, The Cabinet Secretary Ministry of Transport, Infrastructure, Housing & Urban Development is null and void, and of no legal effect.
- (b) A declaration that the intended handover of the operations management and control of Container Terminal 2, berth 22, at the Port of Mombasa, or any other Terminal, or berths, to the 2nd and 3rd Respondents or their agents, successors or assigns by the 1st Respondent through process initiated and operationalized by the 4th and 5th Respondents is a nullity, void in law, and of no legal effect and consequences.
- (c) A permanent injunction be issued to prohibit and restrain the 1st, 4th and 5th Respondents, their agents, successors, assigns, or any other persons or entities acting under them or through their control, from handing over and or ceding the operations, management, control or oversight of Container Terminal 2, berth 22, or any other berths, to the 2nd and 3rd Respondents, their agents, successors, assigns or any other person or entity acting under their instructions or control.
- (d) A permanent injunction be issued, directed against the 1st Respondent, restraining and prohibiting it from abdicating its role, obligations and duties as a Statutory body of operating, managing and controlling all Port operations including Container Terminal 2, berth 22, or other parts of the Port of Mombasa including the Special Economic Zone at Dungu Kundu, the Port of Lamu and

Kisumu and the Inland Container Depots Operated and Managed by the 1st Respondent to other Third Parties including, but not limited to, the Interested Parties herein and not to hand over the same either to the 2nd or 3rd Respondents, whether jointly or singly, or to any other person or entity at all.

(e) The costs of this Petition be in the discretion of the Court.

Dated at Mombasa this 7th day of June.....2022


ABOUBAKAR, MWANAKITINA AND COMPANY
ADVOCATE FOR THE PETITIONER

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TO BE SERVED UPON

1. THE KENYA PORTS AUTHORITY
2. KENYA NATIONAL SHIPPING LINE
3. MEDITERRANEAN SHIPPING COMPANY SA
4. CABINET SECRETARY, TRANSPORT & INFRASTRUCTURE, HOUSING & URBAN DEVELOPMENT
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