

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NUMBER 159 OF 2018**

**IN THE MATTER OF CONTRAVENTION AND THREATENED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS ENshrined UNDER ARTICLES 6, 10, 43 (1), 47, 55, 174  
& 186 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3 (1) OF  
THE CONSTITUTION OF KENYA**

**IN THE MATTER OF INTERPRETATION, ENFORCEMENT AND PROTECTION OF  
BILL OF RIGHTS UNDER ARTICLES 19,20,22,23,24,165 AND 258 OF THE  
CONSTITUTION OF KENYA**

**BETWEEN**

WILLIAM ODHIAMBO RAMOGI.....1<sup>ST</sup> PETITIONER  
ASHA MASHAKA OMAR.....2<sup>ND</sup> PETITIONER  
GERALD LEWA KITTI .....3<sup>RD</sup> PETITIONER

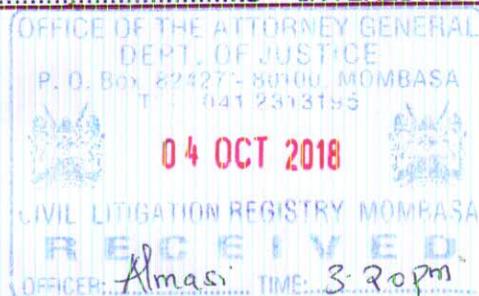
**AND**

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT  
THE CABINET SECRETARY,  
MINISTRY OF TRANSPORT AND INFRASTRUCTURE.....2<sup>ND</sup> RESPONDENT  
KENYA PORTS AUTHORITY.....3<sup>RD</sup> RESPONDENT  
KENYA RAILWAY CORPORATION.....4<sup>TH</sup> RESPONDENT

**AND**

MUSLIMS FOR HUMAN RIGHTS (MUHURI).....1<sup>ST</sup> INTERESTED PARTY  
MAINA KIAI.....2<sup>ND</sup> INTERESTED PARTY  
THE COUNTY GOVERNMENT OF MOMBASA.....3<sup>RD</sup> INTERESTED PARTY

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## AMENDED PETITION

(Pursuant to Order of the court issued on 26<sup>th</sup> September 2018)

TO:

**THE HIGH COURT OF KENYA AT MOMBASA,  
CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

### MOMBASA

THE HUMBLE PETITION OF WILLIAM ODHIAMBO RAMOGI, ASHA MASHAKA OMAR AND GERALD LEWA KITI WHOSE ADDRESS OF SERVICE FOR PURPOSES OF THIS PETITION ONLY IS CARE OF **NYAMBURA KIHORO ADVOCATE, SEA VIEW PLAZA, 2<sup>ND</sup> FLOOR, MAMA NGINA DRIVE/ MARGARET ROAD P.O. BOX 490-80100 MOMBASA** IS AS FOLLOWS:

#### **A. JURISDICTION**

1. The Petitioner brings this suit under Article 165(3) of the Constitution of Kenya which grants this Honourable Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; to hear any question respecting the interpretation of the Constitution including determination of 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.
2. The Petitioner further brings this suit in its interest and the public interest under Articles 22 and 258 of the Constitution of Kenya and thus this Honourable Court has jurisdiction over this matter.

#### **B. DESCRIPTION OF THE PARTIES**

3. The 1<sup>st</sup> Petitioner is an adult male Kenyan of sound mind residing and working for gain in Mombasa County within the Republic of Kenya. He is an Economist by training and Academic qualification; he has undertaken an economic and social research on the issues forming subject matter of the Petition herein. He has filed this Petition on his own behalf as a person whose constitutional rights and enjoyment thereof have been contravened and/or threatened by the actions of the Respondents as particularized in the Petition.

4. The 2<sup>nd</sup> Petitioner is an adult female Kenyan of sound mind residing and working for gain in Mombasa County within the Republic of Kenya. Her ancestral home is at Mikindani within Mombasa County. She is a graduate of Bachelor of Commerce (Marketing Option) from the University of Nairobi. She has filed this Petition on her own behalf as a person whose constitutional rights and enjoyment thereof have been contravened and/or threatened by the actions of the Respondents as particularized in the Petition.
5. The 3<sup>rd</sup> Petitioner is an adult male Kenyan of sound mind residing and working for gain in Mombasa County within the Republic of Kenya. He is an Advocate of High Court of Kenya bearing admission number P.105/15109/2018. His ancestral home is at Dzitsoni in Kilifi County. He has filed this Petition on his own behalf as a person whose rights and enjoyment thereof have been contravened and/or threatened by the actions of the Respondents as particularized in the Petition.
6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners have additionally filed this Petition in public interest in that the matter before this Honourable Court has extremely important implications for the people of Mombasa County in active employment years and their dependants in terms of infringement of their constitutional rights under Articles 6 (1) (2) (3), 10 (2), 43 (1), 47, 55 and 174 of the Constitution of Kenya.
7. The 1<sup>st</sup> Respondent is the principal legal advisor to the Government and is statutorily mandated by Article 156 (4) b of the Constitution to represent the National Government in court and has been sued in that capacity.
8. The 2<sup>nd</sup> Respondent is the Cabinet Secretary, Ministry of Transport and Infrastructure in the National Government and is statutorily mandated to deal with formulation of transport and infrastructure policy matters. Its mandate includes among others to manage maritime transport, rail Transport and infrastructure, and is joined to this Petition in that capacity.
9. The 3<sup>rd</sup> Respondent is a state corporation that was established in 1978 through an ACT of Parliament (The KPA Act Cap 378 of 1978) and is charged with the responsibility of profitably managing the Port of Mombasa and other scheduled seaports along the Kenyan Indian ocean coastline Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimoni, Funzi and Vanga. In addition, the Authority manages Inland Waterways as well as Inland Container Depots at Embakasi, Eldoret and Kisumu.

10. The 4<sup>th</sup> Respondent is ~~the Kenya Railways Corporation~~, a state corporation established under the Kenya Railways Corporation Act (Chapter 397) Laws of Kenya. It is charged with the key mandate of *inter-alia*, planning and development of the rail transport systems and promotion and facilitation of national railway network development. It is joined to this Petition as a respondent as the sole Government corporation in-charge of railway transport in Kenya.

10(a). The 1<sup>st</sup> Interested Party is Muslims for Human Rights (MUHURI), a human rights organization duly established in Kenya. It is an avid promoter and defender of the rule of law and constitutionalism and is guided by the obligation to empower communities to experience the fruits of the constitution through the enjoyment of their rights and freedoms.

10(b). The 2<sup>nd</sup> Interested Party is Maina Kiai, a citizen of the Republic of Kenya. He is an avid proponent of human rights and a believer in the tenets of the bill of rights and the principles of devolution as enshrined in the Kenyan Constitution. He is at all times guided by the purpose to empower communities throughout Kenya to experience the fruits of the constitution through the enjoyment of their rights and freedoms.

10(c). The 3<sup>rd</sup> Interested Party is the County Government of Mombasa, a County established under Articles 6(1), 176(1) and the First Schedule of the Constitution of Kenya 2010. It is enjoined to this Petition as the entity in charge of functions of Mombasa County and activities within Mombasa and the coastal regions.

### **C. BACKGROUND INFORMATION AND FACTS OF THE CASE**

11. The Port of Mombasa is the key entry and exit point for overseas cargo destined to a vast hinterland that include Kenya, Uganda, Rwanda, Burundi, Democratic Republic of Congo, Tanzania, South Sudan, Somalia and Ethiopia.
12. The Port of Mombasa is the second largest port in sub-Saharan Africa with a capacity of about 1,200,000 TEUs and a cargo handling capacity of approximately 28 million tonnestones per year.
13. ~~In 1978, the Kenya Ports Authority~~ The 3<sup>rd</sup> Respondent was established through an Act of Parliament. Its mandate is to manage and operate the Port of Mombasa and all scheduled seaports along Kenya's coastline that include Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimoni, Funzi and Vanga. In addition, the Authority manages Inland Waterways as well as Inland Container Depots at Embakasi, Eldoret and Kisumu.

14. The existence of the Mombasa port has necessitated cargo related handling activities such as clearing and forwarding, warehousing and cargo trucking which create employment opportunities for the residents of Mombasa County. There are with about 360 450 Clearing and Forwarding agent firms established in Mombasa which on average have over 50 employees each. There are and about 212 Container Freight Stations (CFS) out of which 21 are established in Mombasa and 1 in Nairobi, all of which have an average of 200 employees per CFS. The warehousing and cargo tracking also employ a substantial number of people both directly and indirectly. The~~In addition the above mentioned services generate an average of Kshs.75 billion annually in revenue. The port contributes approximately 40% of the County's economy.~~
15. The 3<sup>rd</sup> Respondent ~~Kenya Ports Authority~~ is a major employer of the People of Mombasa County, and surrounding Counties. It has employed with about 6,300 employees who reside within the County of Mombasa; it thus has a great multiplier effect in the economy of Mombasa through purchases and chain employment both directly and indirectly.
- ~~16. The Mombasa Port has also led to the emergence of towns and market centres which depend on the long distance trucks that transport cargo from port to destinations. Such towns and urban centres include: Mombasa satellite urban areas like Changanwe, Jomvu, Mazaras, Mackinon Road, Mariakani, Samburu, Voi, MitoAndei, Masongaleni, Kibwezi, Makindu, Masimba, Emali, Sultan Hamud, Salama, Athi River and Mlolongo.~~
17. In light of the foregoing, the port of Mombasa is a major contributor to the economy of Mombasa County and its neighboring towns and centers with its total contribution estimated at roughly 40% of the Mombasa economy.
18. Mombasa County has a population of 939,760 of which 486,924 and 452,446 are male and female respectively as at the 2009 census. At a growth rate of 10% per annum, it is projected that there are more than 1.5 million people. With only 41 percent of the population being in meaningful employment the county is battling with low literacy levels, unemployment particularly among the youth and high dependency rate.

19. The 3<sup>rd</sup> Respondent's ~~Embakasi~~ Inland Container Depot (ICD) was established in 1984 in ~~Embakasi, Nairobi~~ and is ~~owned and~~ operated by ~~the 3<sup>rd</sup> Respondent Kenya Ports Authority and;~~ it is linked by a metre gauge Railway line with Mombasa port. The Government of Kenya through the ~~4<sup>th</sup> Respondent Kenya Railway Corporation~~ has constructed a Standard Gauge Railway line from Mombasa Port to Nairobi.

19.a The Petitioners aver that the Respondents and particularly the 3<sup>rd</sup> Respondent unfairly made administrative decisions requiring use of its Embakasi ICD to clear imported goods and more specifically the decision to use the address provided in registered PIN Certificate of an importer to determine the clearing destination of the imported goods is in contravention of the rights of importers and an unnecessary clog to port related business within Mombasa and thereby adversely affecting the economic and social rights of the people of Mombasa.

#### **D. FACTS RELATING TO ECONOMIC & SOCIAL RIGHTS OF THE PETITIONERS AND RESIDENTS OF MOMBASA COUNTY**

20. The 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent have entered into an Agreement dated 30<sup>th</sup> September 2014 wherein the 3<sup>rd</sup> Respondent is, *inter alia*, obligated to consign to the 4<sup>th</sup> Respondent as a carrier a set volume of freight and/or other cargo pursuant to commencement of the operations of the Standard Gauge Railway (SGR) to 3<sup>rd</sup> Respondent's Embakasi ICD.

#### **FURTHER PARTICULARS OF THE AGREEMENT**

- i. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents ~~shall~~ are obligated to institute and publicise measures to require shippers, consignors, consignees, clearing and forwarding agents and owners of goods to make provision for the delivery and collection of goods which the 3<sup>rd</sup> Respondent has consigned or intends to consign to the 4<sup>th</sup> Respondent from Embakasi ICD;
- ii. The ~~parties~~ 3<sup>rd</sup> and 4<sup>th</sup> Respondents are required will to procure to the extent allowed by the customs laws the movement of cargo and other imported goods or goods to be exported using SGR line between the port of Mombasa and Embakasi ICD to be is deemed as to be movement within the limits of the port of Mombasa for purposes of the relevant customs laws;

- iii. That if required, the 4<sup>th</sup> Respondent will provide to the Commissioner of the Customs such security as the Commissioner may require to ensure that the goods and freight moving on the SGR line between the port of Mombasa and the Embakasi ICD complies with the provisions relating to transit under bond and where special designation or permission is required, 4<sup>th</sup> Respondent KRC will seek and obtain such permission from the relevant customs authority.
  - iv. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents agree and understand that whereas currently the Embakasi ICD has capacity to handle the volumes anticipated to be made available to the 3<sup>rd</sup> Respondent KPA, the Embakasi ICD will in due course require capacity enhancement to enable it adequately handle the volume of freight, cargo and goods stipulated in Schedule 1 of the Agreement and other cargo likely to be consigned to the ICD.
21. As a result of the foregoing, the freight and cargo handling activities which include container freight station, clearing and forwarding, warehousing and cargo trucking services have all been constructively and effectively ~~been~~ transferred from Mombasa County to the 3<sup>rd</sup> Respondent Embakasi ICD in Embakasi, Nairobi. Specific particulars thereof are that:-
- i. It now costs an importer an extra approximately Kshs.150,000/ to 250,000/- excluding demurrage charge to clear a container at the Embakasi ICD. This cost is brought about by the extra time spent in transporting containers from the port of Mombasa to Embakasi ICD necessitated by the need for cargo trains to queue for days in wait for clearance of offloading space at Embakasi ICD. Recent documentation show that demurrage charges has been as high as 12 Million for one import transaction. As a result the high costs of goods clearance has led to increase in prices of basic commodities.
  - ii. The turn around time for clearing and forwarding cargo has thus changed from about 7 days to 45 days thus escalating the cost of importation in terms of clearing and forwarding cost, container storage & shipping line demurrage charges and other related costs;
  - iii. Clearing and forwarding business entails physical verification of containerized cargo thus necessitating relocation of business to Nairobi and the said firms have had to retrench employees in their establishments within Mombasa County;

- iv. Container Freight Stations have ceased to provide container storage facilities and thereby causing them to retrench their employees based in Mombasa;
  - v. The cost of importation of raw and finished products has escalated thus adversely affecting businessmen and manufacturers based in Mombasa thereby necessitating job cuts
  - vi. The foregoing is also reversing the gains Kenyahas made on the World Bank Index on ease of doing import/export business as it creates artificial trade barriers.
22. The Petitioners aver that the East Africa's regional port business has consequently been transferred from Mombasa County to Nairobi and its environs.
23. As a result, firms in the business of containers freight holding facilities, clearing and forwarding, cargo trucking and related business have been forced to lay off workers and are no longer employing any new recruits due to lack of business; consequently some firms have had to move their business to Nairobi and it's environs in order to conduct their business. The residents and youths of Mombasa County and its environs are most affected by the set of circumstances.
24. The Petitioners aver that the massive loss of business due to the aforesaid will cause the economy of Mombasa County and its environs to shall experience a decline of at least KSh. 40 billion in revenues this year (2018).
- ~~25. The Standard Gauge railway freight train is currently transporting a total of 104 containers daily, this is almost equivalent to the cargo trucks operating daily on the Mombasa Nairobi highway. it is further estimated that by the end of 2018 the freight train will transport an average of 216 containers daily. This will lead to little or no cargo for truck owners to ferry and therefore a decline in revenue from the sector.~~
- ~~26. There will also be complete loss of jobs for truck owners, truck drivers, mechanics and the turn boys as well as loss of business for local communities who directly or indirectly depend on long distance trucks. Many business owners, among them hotels, lodges and shop owners who offer accommodation, foods and drinks and other goods and services to truck operators.~~

- ~~27. This in turn will lead to the decline and/or death of towns and market centres such as: Mombasa satellite urban areas (like Changamwe, Jomvu), Mazaras, Mackinon Road, Mariakani, Samburu, Voi, Mito Andei, Masongaleni, Kibwezi, Makindu, Masimba, Emali, Sultan Hamud, Salama, Athi River and Mlolongo which depend on the long distance trucks that transport cargo from port to destinations.~~
28. The Petitioners contend that the operations of the 3<sup>rd</sup> Respondent through the Embakasi ICD undermine the development of Mombasa County and its environs; the dry ports ought to have been developed within a radius of 100 to 150 kilometers from the Mombasa Port.
29. The Petitioners aver that since the Mombasa port is a huge economic hub, developing an inland container depot in the surrounding underdeveloped counties as opposed to Embakasi ICD will support the economic rights of the residents of Mombasa County and its environs.
30. Noting that the Mombasa port occupies about 20% of the land mass of Mombasa County, the Petitioners aver that the Port which arises from a natural resource, ought to greatly benefit the people of Mombasa County and its environs.
31. The Petitioners aver that the residents of Mombasa and its environs bear the greatest negative effects of the port arising from the high environmental degradation as a result of the port and its activities. Hot steam, oil from the engines of the ships are released into the air as well as into the Indian Ocean, this is hazardous to the residents who inhale this air, the marine life which is most oftenly bloated and choked to death by the oil spillage. The dust emanating from the clinkers and bulky containers is inhaled by the residents and on windy days is scattered across wider geographical area.
32. This environmental degradation has led to loss of marine life which in turn reduces the opportunity for commercial fishing which is also a source of livelihood for the people of Mombasa County. The lives of children are endangered as they swim and play in the ocean waves breaking over the shore close to the point of discharge oblivious of the dangers posed and injured to the stench.
33. The Petitioners contend that if the Mombasa residents are endangered and suffer losses as a result of their proximity to the port then it follows they ought to be the greatest beneficiaries of the port.

34. The Port at Mombasa in 2016 is reported to have generated gross revenue of Kshs.38 Billion and a Kshs.6.6 Billion profit after tax. This revenue is directly received and managed by the national government.

**E. FACTS RELATING TO DEVOLUTION, REGULATION AND OPERATION OF MOMBASA PORT SERVICES**

35. The Port of Mombasa is currently owned, controlled and operated by the National government on behalf of the Kenyan citizens, through the Kenya Ports Authority.
36. The Petitioners aver that as is the practice in major parts of the world such as Rotterdam port, for most effective use and development of the port of Mombasa ownership and management should be by the state and county governments. This model of ownership is beneficial as the region is engaged in meeting the ports requirements owing to the major role played by the port in the region's economic growth.
37. The Petitioners further aver that major ports developed by their governments in the world such as Shanghai and Gotheburg are owned and controlled by the Port city Municipalities or states in which they are located.
38. The Petitioners aver that the main functions that would encompass co-ordination and regulation, which the national ports authority should control would be:-
- i. Investment: power to approve proposals for port investments in amounts above a certain figure - for example, \$5 million. The criterion for approval would be that the proposal was broadly in accordance with a national ports plan - which the authority would maintain.
  - ii. Financial policy: power to set common financial objectives for ports (for example. required return on investment defined on a common basis) - with a common policy on what infrastructure will be funded centrally and locally; advising the government on loan applications.
  - iii. Tariff policy: power to set a common tariff structure (local conditions will determine to what extent the authority should also regulate tariff levels).
  - iv. Labour policy: power to set common recruitment standards, a common wage structure and common qualifications tor promotion; power to approve common labour union procedures.
  - v. Licensing: where appropriate, power to establish principles for the licensing of port employers, agents, etc.

- vi. Information and research: power to collect, collate, analyse and disseminate statistical information on port activity for general use, and to sponsor research into port matters as required.
  - vii. Legal: power to act as legal adviser to port authorities.
  - viii. Regulation of international and national shipping and matters related thereto.
39. The operational functions that would be managed by the local body would be:-
- i. Ship navigation to and from the terminals; this involves providing navigation aids and vessel traffic separation facilities(VTS), approach channel, pilotage, tugs and mooring, berths
  - ii. Administrative services to the ship and crew by overseeing Security and safety, ~~immigration, customs~~, health, tidal locks
  - iii. Ship repairs and ship handling by providing repairs and maintenance of the ship, provision of supplies, communication facilitation,
  - iv. Cargo handling; Loading, offloading, sorting,
  - v. Facilitating clearing and forwarding; Inspections, duty payments
  - vi. Storage; Warehousing, use of container depots, container freight stations
  - ~~vii. Facilitating transport; Rail and/or road~~
  - viii. Harbour functions
40. The Petitioners aver that, in light of the foregoing, the role of managing the port should be upon a local authority and a national authority to the extent expounded. There is therefore need for a local body to be established under the Mombasa County government which will be engaged in the operational functions of the port while the National government remains in control of coordination and regulation of the port.
41. It is the Petitioners contention that Mombasa County Government ~~having been being~~ created under Article 6(1) of the Constitution of Kenya is vested with power under the Fourth Schedule to the Constitution to manage county transport including harbours ~~but~~, excluding the regulation of international and national shipping and matters related thereto.
42. The Petitioner avers that maritime navigation which is a power reserved for the National government comes to an end once the ship is docked at the port and begins after the ship leaves the ports.

43. The Petitioner is apprehensive that unless the court makes a determination on assignment of different activities to the national and county government as stipulated in the Constitution and in accordance with world best practice in the context of the fact that the port is not an entity but a collection of services, the constitutional rights of the residents of Mombasa county shall be infringed as well as the economy of Mombasa county shall be stifled.

**F. THE LEGAL, CONSTITUTIONAL AND STATUTORY FOUNDATIONS OF THE PETITION AND CONTRAVENTIONS THEREOF**

44. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds all persons and all state organs at both levels of government. The National and County governments are thus obliged to conduct their functions in accordance with the Constitution.
45. Article 2(6) of the Constitution states that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that; "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
46. Article 2(4) of the Constitution provides among other things that any act or omission in contravention of the Constitution is invalid. The present operation of the port activities and functions is legally invalid.
47. Article 3 of the Constitution obligates every person to respect, uphold and defend the constitution. The Petitioners are obligated to seek enforcement of the Kenya Constitution and to petition for upholding of the Constitution by the Respondents.
48. Article 6 of the Constitution as read together with Article 186. Article 6 divides the territory of Kenya into counties and provides that the governments at national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation. Article 186 (1) provides that except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule. Part 1 sub paragraph 18 (f) provides that Marine navigation is a function of the National government while Part 2 sub paragraph 5(e) gives the County

Government the function and powers to manage County transport including (e) ~~ferries and harbours~~ excluding the regulation of international and national shipping and matters related thereto. It is a violation of the constitution for National Government not to have devolved the harbour function to the County Government of Mombasa.

49. Article 10 of the Constitution sets out the National values and principles of government that bind all state organs, state officers, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law or implement public policy decisions. Among the national values and principles of governance are the sharing and devolution of power, rule of law, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability. The actions complained of are against the spirit and object of devolution.
- ~~50. Among the national values and principles of governance are the sharing and devolution of power, rule of law, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability.~~
51. Article 20 applies the Bill of Rights to all law and binds all state organs and all persons and, further obligates this Honorable Court, in interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and the spirit. Purpose and objects of the Bill of Rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
52. Article 22(1), read together with Article 258(1) of the Constitution gives every person the right to institute court proceedings claiming the right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 22 and Article 258(2) provide that in addition to a person acting in their own interest, court proceedings under clause 1 may be instituted by a person acting in the public interest;
53. Article 23 of the Constitution vests authority in this Honorable court to uphold and enforce the Bill of Rights and the jurisdiction to grant appropriate remedies and reliefs in Article 23(3) to uphold and enforce the Bill of Rights.

54. Article 43(1) of the Constitution states that every person has the right to the highest attainable standards of economic and social rights. The Petitioner is apprehensive that the agreement between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent will lead to an economic meltdown within Mombasa County and it's environs thus undermining the economic and social rights of the affected people and is in any event against the spirit of devolution and undermines the entirety of constitutionally guaranteed rights particularized herein. The abovementioned actions threaten the Mombasa residents' right to the highest attainable standards of economic and social rights as guaranteed under Article 43 (1). Their right to work which includes, right to earn a living by work which they freely choose or accept and to have the state take appropriate steps to safeguard this right as is guaranteed and expected by Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is violated. In addition, the Petitioners are unfairly deprived of employment and economic activities that belie their source of livelihood.
- ~~55. Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that: "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.~~
- 55(a). Article 47 of the Constitution states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. it further provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. The actions of the Respondents and particularly the 3<sup>rd</sup> Respondent is in violation of Article 47 and the Fair Administrative Action Act No. 4 of 2015.
56. Article 55 (c) of the Constitution provides that the state is to take measures to ensure that the youth access employment. Those affected most are the people within the employment bracket and majority of whom constitute the youth.
57. Article 174 outlines the object of devolution and particularly at sub articles 174 (c), (d) and (f) which states the objects of Devolution to include "to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and making decisions affecting them; to recognize the right of communities to manage their own affairs and to further their development; and to protect and promote social and economic development.

58. Article 189 provides for Relationships between Governments, (Cooperation between national and county governments) and it reads, "Government at either level shall—
- (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;
  - (b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and
  - (c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.
- (2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities;
- (3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation."

#### ~~G. CONTRAVENTION OF THE LAW~~

- ~~59. The abovementioned actions threaten the Mombasa residents' right to the highest attainable standards of economic and social rights as guaranteed under Article 43 (1) Their right to work which includes, right to earn a living by work which they freely chooses or accept and to have the state take appropriate steps to safeguard this right as is guaranteed and expected by Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is violated. In addition, the Petitioners are unfairly deprived of employment and economic activities that belie their source of livelihood.~~
- ~~60. The actions complained of are against the spirit and object of Devolution; the objects of the devolution is to give powers of self governance to the people and enhance the participation of the people in the exercise of the powers of the state and making decisions affecting them; to recognize the right of communities to manage their own affairs and to further their development; and to protect and promote social and economic development. The citizen of Mombasa County will be declined the opportunity to protect and promote their self development as a major activities that form part of their source of livelihood shall be taken from them.~~

- ~~61. The Petitioner is apprehensive that the agreement between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent will lead to an economic meltdown within Mombasa County and its environs thus undermining the economic rights of the affected people and is in any event against the spirit of devolution and undermines the entirety of constitutionally guaranteed rights particularized herein.~~
- ~~62. It is a violation of the constitution for National government not to have devolved the function of managing and operation of harbours in relation to transport to the County Government.~~

**H. WHETHER THERE IS A PENDING SUIT RELATED TO THE INSTANT PETITION**

63. The Petitioner affirms that the present matter has not been heard and determined on merits by a court of competent jurisdiction and hence the same is proper before this Court.

**I. PRAYERS**

**YOUR PETITIONER** therefore **HUMBLY PRAYS** for the following **ORDERS:-**

- a) A declaration that the Agreement dated 30<sup>th</sup> September 2014 between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent, threatens and /or contravenes the social and economic rights of the Petitioners and residents of Mombasa County under Article 43 of the Constitution on the grounds stated in the Petition herein and thus unconstitutional;
- a)i ~~An Order that the 3<sup>rd</sup> Respondents administrative decision requiring shippers, consignors, consignees, clearing and forwarding agents and owners of goods to deliver and collect freight and Cargo from 3<sup>rd</sup> Respondent's Embakasi ICD is unfair and contravenes the economic and social rights of the residents of Mombasa County and business community thus unconstitutional;~~
- b) A declaration that the 3<sup>rd</sup> Respondent's operations vide it's Embakasi ICD and/ or other existing ICD threatens and/ or contravenes the social and economic rights of the Petitioners and residents of Mombasa County under Article 43 of the Constitution on the grounds stated in the Petition herein and thus unconstitutional;in the alternative, that an ICD be established within a reasonable radius from the port of Mombasa within geographical area of Mombasa County in order to secure the source of livelihood of the people of Mombasa County and surrounding Coastal Counties arising from the port activities and functions;

- ~~c) A declaration that the Respondents have failed to safeguard the public interest and the common good of Mombasa County residents by failing to protect their social and economic rights on the grounds stated in the Petition herein;~~
- d) An order that the Mombasa port services be assigned to the National Government and County Government of Mombasa in accordance with Paragraph 5(e) of part 2 of the fourth Schedule of the Constitution and particularly that the management and operations of the port with respect to County transport harbor functions is a function of the Mombasa County Government. ~~and the National Government be responsible for Regulation functions;~~
- e) An order for enforcement and implementation of County transport harbor function by the 3<sup>rd</sup> Interested Party.
- ~~f) An order that Mombasa County establishes a corporate body with the Mandate to run the management and operational functions of the port in accordance with established law;~~
- g) An order that the Respondents actions complained off herein contravenes Articles 6, 10, 43 (1), 47, 55, 174 & 186 of the Constitution.
- h) Costs of this Petition;
- i) Any further Relief or Orders that this Honourable Court may deem just and fit to grant.

~~DATED at MOMBASA this 23<sup>rd</sup> day of MAY 2018~~

~~AMMENDED AT MOMBASA this 2<sup>nd</sup> day of OCTOBER 2018~~

*Nyambura*

**NYAMBURA KIHORO**  
**ADVOCATE FOR THE PETITIONER**

**DRAWN & FILED BY:-**

NYAMBURA KIHORO,  
ADVOCATE,  
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**MOMBASA**

ADM. NO: P105/13356/17  
Practice no. LSK/2018/04442

**TO BE SERVED UPON:-**

~~THE ATTORNEY GENERAL~~

~~HARAMBEE AVENUE~~

~~**NAIROBI**~~

~~KENYA PORTS AUTHORITY~~

~~MBARAKI OFF ROAD~~

~~**MOMBASA**~~

~~CABINET SECRETARY~~

~~MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING AND URBAN DEVELOPMENT~~

~~TRANSCOM HOUSE, NGONG ROAD~~

~~**NAIROBI**~~

~~KENYA RAILWAYS CORPORATION~~

~~P.O Box 30121 00100,~~

~~**NAIROBI**~~

~~THE ATTORNEY GENERAL~~

~~NATIONAL SOCIAL SECURITY BUILDING, 6<sup>TH</sup> FLOOR~~

~~**MOMBASA**~~

~~MILLER & COMPANY ADVOCATES~~

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P.O.BOX 22671-00100

**NAIROBI**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NUMBER 159 OF 2018**

**IN THE MATTER OF CONTRAVENTION AND THREATENED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS ENSHRINED UNDER ARTICLES 6, 10, 43 (1), 47, 55, 174  
& 186 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3 (1) OF  
THE CONSTITUTION OF KENYA**

**IN THE MATTER OF INTERPRETATION, ENFORCEMENT AND PROTECTION OF  
BILL OF RIGHTS UNDER ARTICLES 19, 20, 22, 23, 24, 165 AND 258 OF THE  
CONSTITUTION OF KENYA**

BETWEEN

03 OCT 2018

WILLIAM ODHIAMBO RAMOGI.....1<sup>ST</sup> PETITIONER  
ASHA MASHAKA OMAR.....2<sup>ND</sup> PETITIONER  
GERALD LEWA KITI .....3<sup>RD</sup> PETITIONER

AND

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT  
THE CABINET SECRETARY,  
MINISTRY OF TRANSPORT AND INFRASTRUCTURE.....2<sup>ND</sup> RESPONDENT  
KENYA PORTS AUTHORITY.....3<sup>RD</sup> RESPONDENT  
KENYA RAILWAYS CORPORATION.....4<sup>TH</sup> RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS (MUHURI).....1<sup>ST</sup> INTERESTED PARTY  
MAINA KIAI.....2<sup>ND</sup> INTERESTED PARTY  
THE COUNTY GOVERNMENT OF MOMBASA.....3<sup>RD</sup> INTERESTED PARTY

**PETITIONERS AFFIDAVIT IN SUPPORT OF THE AMENDED PETITION**

I **WILLIAM ODHIAMBO RAMOGI** of Post Office Box Number 490, 80100 Mombasa in the Republic of Kenya, do hereby make oath and state as follows:-

1. **THAT** I am an adult male of sound mind hence competent to swear this Affidavit.
2. **THAT** I am the 1<sup>st</sup> Petitioner herein residing in Shanzu and working for gain in Mombasa County within the Republic of Kenya; I am the bearer of Passport number A2046763. Further that I am an economist by academic training and profession.
3. **THAT** the 2<sup>nd</sup> Petitioner is an adult female Kenyan of sound mind residing and working for gain in Mombasa County within the Republic of Kenya and bearer of national identity card number 23457490. Further that I am aware that her ancestral home is at Mikindani within Mombasa County and her immediate and extended family reside therein. She is a graduate of Bachelor of Commerce (Marketing Option) from the University of Nairobi
4. **THAT** the 3<sup>rd</sup> Petitioner is an adult male Kenyan of sound mind residing and working for gain in Mombasa County within the Republic of Kenya and bearer of national identity card number 28533670. Further that I am aware that he is an Advocate of High Court of Kenya bearing admission number P.105/15109/2018 and that his ancestral home is at Dzitsoni in Kilifi County wherein his immediate and extended family reside. Annexed hereto and marked **WOR 1 a, b, c & d** are the respective copies of Passport and national identity card for the petitioners together with the 1<sup>st</sup> Petitioner's degree certificate.
5. **THAT** I have read and where necessary had explained to me the contents of the Amended Petition herein and I swear this Affidavit in support of the same and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners upon their respective authorization to do so. Annexed hereto and marked **WOR 2** is the Letter of Authority.

6. **THAT** save as otherwise expressly stated herein, the contents of this affidavit are based on my own knowledge, information, statistics gathered from a research conducted on the matters in issue and my belief. To the extent that any matter in this affidavit is based on information and/or belief, I have disclosed the source and/or ground (as the case may be) of the same, and I verily believe the same to be true.
  
7. **THAT** I am aware that the Port of Mombasa is a key entry and exit point for overseas cargo destined to a vast hinterland that include Kenya, Uganda, Rwanda, Burundi, Democratic Republic of Congo, Tanzania, South Sudan, Somalia and Ethiopia. Further that the Port of Mombasa is the second largest port in sub-Saharan Africa with a capacity of about 1,200,000 TEUs and a cargo handling capacity of approximately 28 million tones per year.
  
8. **THAT** the 3<sup>rd</sup> Respondent was established in 1978 through an Act of Parliament. Its mandate is to manage and operate the Port of Mombasa and all scheduled seaports along Kenya's coastline that include Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimoni, Funzi and Vanga. In addition, the Authority manages Inland Waterways as well as Inland Container Depots at Embakasi in Nairobi, Eldoret and Kisumu.
  
9. **THAT** the existence of the Mombasa port has necessitated cargo handling activities such as clearing and forwarding, warehousing and cargo trucking which create employment opportunities for the residents of Mombasa County; there are about 450 Clearing and Forwarding agent firms established in Mombasa which on average have over 50 employees each and 22 Container Freight Stations(CFS) out of which 21 are established in Mombasa and 1 in Nairobi all of which have an average of 200 employees per CFS.

10. **THAT** The warehousing and cargo tracking also employ a substantial number of people both directly and indirectly. The above mentioned services generate an average of Kshs.75 billion annually in revenue. The port therefore contributes approximately 40% of the County's economy.
11. **THAT** the 3<sup>rd</sup> Respondent is a major employer of the People of Mombasa County and surrounding Counties. It has employed about 6,300 employees who reside within the County of Mombasa; the stated employment has a great multiplier effect in the economy of Mombasa through purchases and chain employment both directly and indirectly.
12. **THAT** in light of the foregoing, the port of Mombasa is a major contributor to the economy of Mombasa County and its neighboring towns and centers with its total contribution estimated at roughly 40% of the Mombasa economy.
13. **THAT** based on information sourced from Kenya National Bureau of Statistics, Mombasa County has a population of 939,760 of which 486,924 and 452,446 are male and female respectively as at the 2009 census. At a growth rate of 10% per annum, it is projected that there are more than 1.5 million people. With only 41 percent of the population being in meaningful employment the county is battling with low literacy levels, unemployment particularly among the youth and high dependency rate.
14. **THAT** the 3<sup>rd</sup> Respondent's Inland Container Depot (ICD) in Embakasi Nairobi was established in 1984 and linked by a metre gauge Railway line with Mombasa port. The Government of Kenya through the 4<sup>th</sup> Respondent has since constructed a Standard Gauge Railway line from Mombasa Port to Nairobi.

15. **THAT** I know that the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent have entered into an Agreement dated 30<sup>th</sup> September 2014 wherein the 3<sup>rd</sup> Respondent is, *inter alia*, obligated to consign to the 4<sup>th</sup> Respondent as a carrier, a set volume of freight and/or other cargo pursuant to commencement of the operations of the Standard Gauge Railway (SGR) to 3<sup>rd</sup> Respondent's Embakasi ICD in Nairobi.
16. **THAT** further to the said Agreement, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are obligated to institute and publicise measures requiring shippers, consignors, consignees, clearing and forwarding agents and owners of goods to make provision for the delivery and collection of goods from Embakasi ICD which the 3<sup>rd</sup> Respondent has consigned or intends to consign to the 4<sup>th</sup> Respondent.
17. **THAT** similarly in the said Agreement, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are required to procure, to the extent allowed by the customs laws, the movement of cargo and other imported goods or goods to be exported using SGR line between the port of Mombasa and Embakasi ICD to be deemed as movement within the limits of the port of Mombasa for purposes of the relevant customs laws; Annexed hereto and marked **WOR 3** is a copy of the said Agreement dated 30<sup>th</sup> September 2014.
18. **THAT** consequent to the subject Agreement, it has been agreed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents that they will in due course require capacity enhancement of Embakasi ICD to enable it adequately handle the volume of freight, cargo and goods stipulated in the Agreement and other cargo likely to be consigned.
19. **THAT** as a result of the foregoing, the freight and cargo handling activities which include container freight Stations, clearing and forwarding, warehousing and cargo

trucking services have all been constructively and effectively transferred from Mombasa County to the 3<sup>rd</sup> Respondent ICD in Embakasi, Nairobi.

20. **THAT** additionally, the East Africa's regional business relating to port functions has also been transferred from Mombasa County to Nairobi and its environs.
21. **THAT** the Respondents and particularly the 3<sup>rd</sup> Respondent, has over time made unfair administrative decisions requiring use of its Embakasi ICD which has caused an unnecessary clog to port related business within Mombasa and thereby adversely affecting the economic and social rights of the people of Mombasa. Annexed hereto and marked **WOR 4 a & b** are a sample of the notices.
22. **THAT** further to the aforementioned:-
  - i. It now costs an extra approximately Kshs.150,000/ to 250,000/- excluding demurrage charge to clear a container at the Embakasi ICD. This cost is brought about by the extra time spent in transporting containers from the port of Mombasa to Embakasi ICD necessitated by the need for cargo trains to queue for days in wait for clearance of offloading space at Embakasi ICD. Recent documentation show that demurrage charges has been as high as 12 Million for one transaction. As a result of the foregoing the high costs of goods clearance has led to price increase of basic commodities
  - ii. The turn around time for clearing and forwarding cargo has thus changed from about 7 days to about 60 days thus escalating the cost of importation in terms of clearing and forwarding cost, container storage & shipping line demurrage charges and other related costs;

- iii. Clearing and forwarding business entails physical verification of containerized cargo thus necessitating relocation of business to Nairobi and the said firms have had to retrench employees in their establishments within Mombasa County;
- iv. Container Freight Stations have ceased to provide container storage facilities and thereby causing them to retrench their employees based in Mombasa;
- v. The cost of importation of raw and finished products has escalated thus adversely affecting businessmen and manufacturerers based in Mombasa thereby necessitating job cuts
- vi. The foregoing is also reversing the gains Kenya has made on the World Bank Index on ease of doing import/export business as it creates artificial trade barriers.

23. **THAT** the firms in the business of containers freight, clearing and forwarding, cargo trucking and related business have been forced to lay off workers and are no longer employing any new recruits due to lack of business; some firms have had to move their business to Nairobi and it's environs in order to continue conducting their business at Embakasi ICD. The residents and youths of Mombasa County and its environs are most affected by the loss of jobs and relocation of employment opportunities.

24. **THAT** various stakeholders have expressed grievances and dissatisfaction on port operations arising from the forced use of 3<sup>rd</sup> Respondent's Embakasi ICD. Further that I personally held discussions with Kenya International Freight & Warehousing Association (KIFWA) officials who confirmed these depositions. Annexed hereto and

marked **WOR 5 a, b, c & d** are documents from the said Association confirming the contentions herein.

25. **THAT** due to the massive loss of business arising from the aforesaid, the economy of Mombasa County and its environs to experience a decline of at least Ksh. 40 billion in revenues this year (2018) as reported by the Standard Newspaper on 27<sup>th</sup> March 2018. Annexed hereto and marked **WOR 6** is a copy of the said Article of the Standard Newspaper dated 27<sup>th</sup> March 2018.
26. **THAT** the operations of the 3<sup>rd</sup> Respondent through the Embakasi ICD and particularly in the context of the subject Agreement, undermines the economic and social development of Mombasa County and its environs; the second best alternative would have been to establish the Inland Container Depots within a radius of 100 to 150 kilometers from the Mombasa Port in order to benefit the neighboring Counties and progressively establish in other parts of the Country.
27. **THAT** I am aware that the Mombasa port is a huge economic hub hence developing an inland container depot in the surrounding underdeveloped counties as opposed to Embakasi ICD will support the economic rights of the residents of Mombasa County and its environs.
28. **THAT** noting that the Mombasa port occupies about 20% of the land mass of Mombasa County, it is a natural resource unique to Mombasa County as much as there are other natural resources uniquely situated in other parts of this country which greatly benefit the residents thereof, the Petitioners aver that the Port ought to similarly greatly benefit the people of Mombasa County and its environs in the first instance.

29. **THAT** the residents of Mombasa and its environs bear the greatest negative effects of the port arising from the high environmental degradation as a result of the port and its activities. Hot steam, oil from the engines of the ships are released into the air as well as into the Indian ocean, this is hazardous to the residents who inhale this air, the marine life which is most often bloated and choked to death by the oil spillage. The dust emanating from the clinkers and bulky containers is inhaled by the residents and on windy days is scattered across a wider geographical area.
30. **THAT** this environmental degradation has led to loss of marine life which in turn reduces the opportunity for commercial fishing which is also a source of livelihood for the people of Mombasa County. The lives of children are endangered as they swim and play in the ocean waves breaking over the shore close to the point of discharge oblivious of the dangers posed and inured to the stench.
31. **THAT** if the Mombasa residents are endangered and suffer losses as a result of their proximity to the port then it follows they ought to be the greatest beneficiaries of the port.
32. **THAT** the Mombasa Port is reported to have generated gross revenue of Kshs.38 Billion and a Kshs.6.6 Billion profit after tax in 2016. This revenue is directly received and managed by the national government through the 3<sup>rd</sup> Respondent at the exclusion of local participation through the County Government.
33. **THAT** the Respondents and particularly the 3<sup>rd</sup> Respondent unfairly made administrative decisions requiring use of its Embakasi ICD to clear imported goods and more specifically the decision to use the address provided in registered PIN

Certificate of an importer to determine the clearing destination of the imported goods is in contravention of the rights of importers and an unnecessary clog to port related business within Mombasa and thereby adversely affecting the economic and social rights of the people of Mombasa.

34. **THAT** major ports developed by their governments in the world such as Shanghai and Gotheburg are owned and controlled by the Port city Municipalities or states in which they are located. Further that this is the practice in major parts of the world.
35. **THAT** to ensure most effective use and development of the port of Mombasa, ownership and management should be by the National Government and Mombasa County Government. This model of ownership is beneficial as the port is a collection of activities and services that are intergovernmental in nature.
36. **THAT** in an intergovernmental model of port ownership and management, the main functions of a national government would encompass co-ordination and regulation which would include:-
  - i. Investment: power to approve proposals for port investments in amounts above a certain figure - for example, \$5 million. The criterion for approval would be that the proposal is broadly in accordance with a national ports plan - which the authority would maintain.
  - ii. Financial policy: power to set common financial objectives for ports (for example. required return on investment defined on a common basis) - with a common policy on what infrastructure will be funded centrally and locally; advising the government on loan applications.
  - iii. Tariff policy: power to set a common tariff structure (local conditions will determine to what extent the authority should also regulate tariff levels).

- iv. Labour policy: power to set common recruitment standards, a common wage structure and common qualifications for promotion; power to approve common labour union procedures.
- v. Licensing: where appropriate, power to establish principles for the licensing of port employers, agents, etc.
- vi. Information and research: power to collect, collate, analyse and disseminate statistical information on port activity for general use, and to sponsor research into port matters as required.
- vii. Legal: power to act as legal adviser to port authorities.
- viii. Regulation of international and national shipping and matters related thereto.

37. **THAT** the operational functions that would be managed by the local authority through a County government would be:-

- i. Ship navigation to and from the terminals; this involves providing navigation aids and vessel traffic separation facilities (VTS), approach channel, pilotage, tugs and mooring, berths
- ii. Administrative services to the ship and crew by overseeing Security and safety, health, tidal locks
- iii. Ship repairs and ship handling by providing repairs and maintenance of the ship, provision of supplies, communication facilitation,
- iv. Cargo handling; Loading, offloading, sorting,
- v. Facilitating clearing and forwarding & verifications
- vi. Storage; warehousing, use of container depots, container freight stations
- vii. Harbour function.

38. **THAT** in light of the foregoing, the role of managing the port should be upon a local authority and a national authority to the extent expounded.
39. **THAT** it is our contention that Mombasa County Government having been created under Article 6(1) of the Constitution of Kenya is vested with power under the Fourth Schedule to the Constitution to manage county transport including harbours, but excluding the regulation of international and national shipping and matters related thereto.
40. **THAT** we aver that maritime navigation which is a power reserved for the National Government comes to an end once the ship is docked at the port and begins after the ship leaves the ports.
41. **THAT** we are apprehensive that unless the court makes a determination on assignment of different activities to the national and county government as stipulated in the Constitution and in accordance with world best practice in the context of the fact that the port is not an entity but a collection of services, the constitutional rights of the residents of Mombasa county shall be infringed as well as the economy of Mombasa county shall be stifled.
42. **THAT** the actions by the Respondents threaten the Mombasa residents' right to the highest attainable standards of economic and social rights as guaranteed under Article 43 (1) Their right to work which includes, right to earn a living by work which they freely chooses or accept and to have the state take appropriate steps to safeguard this right as is guaranteed and expected by Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, the

Petitioners are unfairly deprived of employment and economic activities that belie their source of livelihood.

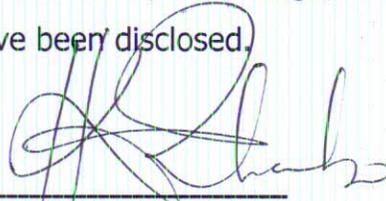
43. **THAT** the actions complained of are against the spirit and object of Devolution; the objects of the devolution is to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and making decisions affecting them; to recognize the right of communities to manage their own affairs and to further their development; and to protect and promote social and economic development. The residents of Mombasa County will be denied the opportunity to protect and promote their self-development as major activities that form part of their source of livelihood shall be taken from them.
44. **THAT** we as Petitioners are apprehensive that the agreement between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent will lead to an economic meltdown within Mombasa County and its environs thus undermining the economic rights of the affected people and is in any event against the spirit of devolution and undermines the entirety of constitutionally guaranteed rights particularized herein.
45. **THAT** the actions by the Respondents and particularly the 3<sup>rd</sup> Respondent are in contravention to the right to fair Administrative action as guaranteed under Article 47 of the Constitution and the Fair Administrative Action Act No.4 of 2015.
46. **THAT** it is a violation of the constitution for National government not to have devolved the Mombasa port harbour functions to the County Government of Mombasa.
47. **THAT** I swear this Affidavit in support of the Petition before this Honourable Court.

THAT what is deposed to herein is true to the best of my knowledge, information and belief, save for where sources of information have been disclosed.

BORN at Mombasa by the said

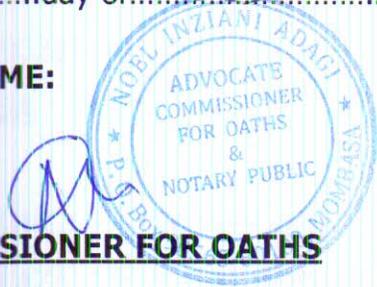
**WILLIAM ODHIAMBO RAMOGI**

the 2<sup>nd</sup> day of October 2018



**DEPONENT**

BEFORE ME:



**COMMISSIONER FOR OATHS**

**SWORN AND FILED BY:**

EMBEURA KIHORO,  
ADVOCATE,  
NEW PLAZA, 2<sup>ND</sup> FLOOR  
MANGINA DRIVE/ MARGARET ROAD  
TELEPHONE NO. 490-80100  
**MOMBASA**

FILE NO: P105/13356/17  
CASE no. LSK/2018/04442

**THE SERVED UPON:-**

ATTORNEY GENERAL  
NATIONAL SOCIAL SECURITY BUILDING, 6<sup>TH</sup> FLOOR  
**MOMBASA**

LLER & COMPANY ADVOCATES  
NEW PLAZA, 1<sup>ST</sup> FLOOR

**TO BE SERVED UPON:-**

THE ATTORNEY GENERAL  
NATIONAL SOCIAL SECURITY BUILDING, 6<sup>TH</sup> FLOOR  
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