REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Lenaola & Ouko SCJJ)

PETITION (APPLICATION) NO. E010 OF 2024

(CONSOLIDATED WITH PETITION NO. E011 OF 2024)

–BETWEEN–

DOCK WORKERS UNION.....1ST APPELLANT/APPLICANT
OKIYA OMTATAH OKOITI.....2ND APPELLANT/APPLICANT

-AND-

PORTSIDE FREIGHT TERMINALS LIMITED.....1ST RESPONDENT
PORTSIDE CFS LIMITED.....2ND RESPONDENT
HEARTLAND TERMINALS LIMITED.....3RD RESPONDENT
KENYA PORTS AUTHORITY.....4TH RESPONDENT
CABINET SECRETARY FOR NATIONAL TREASURY & ECONOMIC PLANNING.....5TH RESPONDENT
KILINDINI TERMINALS LIMITED.....6TH RESPONDENT
MOMBASA GRAIN TERMINAL LIMITED.....7TH RESPONDENT
KAPA OIL REFINERY.....8TH RESPONDENT
AFRICA PORTS & TERMINALS.....9TH RESPONDENT
MULTISHIP INTERNATIONAL.....10TH RESPONDENT
KATIBA INSTITUTE.....11TH RESPONDENT

(Being applications for Conservatory Orders from the Judgment of the Court of Appeal at Mombasa (Nyamweya, Laibuta & Odunga, JJ.A) delivered on 23rd February 2024 in Civil Appeal No. E130 of 2023)

Representation:

Mr. Marube h/b for Mr. Nyaundi for the 1st appellant/applicant
(*Marende & Nyaundi Associates*)

Mr. Okiya Omtatah Okoiti the 2nd appellant/applicant
(*In Person)*

Ms.Esajee h/b for Mr. Khagram for the 1st, 2nd and 3rd respondents
(*AB Patel & Patel Advocates*)

Non-appearance by the 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents

Ms. Eileen Imbosa for the 11th respondent
(*Katiba Institute)*

RULING OF THE COURT

[1] This ruling is intended to dispose of two similar motions for conservatory and injunctive orders dated 7th May 2024 and 6th May 2024 filed by Dock Workers Union (the 1st applicant) and Okiya Omtatah Okoiti (the 2nd applicant), respectively.

[2] Apart from the two applications before us, it is instructive to note also that two appeals being **Petition No. E010 of 2024** at the instance of the 1st applicant and **Petition No. E011 of 2024** by the 2nd applicant, have been lodged in this Court's Registry against the Court of Appeal's judgment in **Civil Appeal No. E130 of 2023** dated 23rd February 2024. The two appeals were consolidated by a consent order recorded by this Court on 17th May 2024, wherein **Petition No. E010 of 2024** was designated as the lead file.

[3] UPON READING the two aforesaid Notice of Motions expressed to be brought pursuant to Sections 23A and 24 of the Supreme Court Act and Rules 3, 31 and 32 of the Supreme Court Rules, 2020 for orders, *inter alia* that pending the hearing and determination of the consolidated appeal, the Court be pleased to issue:

i. *A conservatory order restraining the 1st, 2nd and 3rd respondents from constructing and or developing a grain handling facility and island berth at G- Section Area, Kenya Port Authority, Port of Mombasa pursuant to the license and wayleave granted by the 4th respondent on 2nd August 2021;*
ii. *An order of temporary injunction restraining the 1st, 2nd and 3rd respondents, its employees, agents, servants, affiliates and/or subsidiaries from undertaking and/or initiating any work pursuant to the license and wayleave agreement for the development of a grain handling facility and development of an island berth at G- Section Area, Kenya Port Authority, Port of Mombasa issued on 2nd August 2021; and*
iii. *Costs of this application be borne by the respondents;* and

[4] UPON CONSIDERING the supporting affidavit sworn on 24th April, 2024 by the 1st applicant's Secretary General, Simon Sang, together with their written submissions dated 7th May 2024 and the supporting affidavit of Okiya Omtatah Okoiti, the 2nd applicant, and his written submissions dated 9th May 2024, whose combined effect is that: the procurement process and award of the license and wayleave to the 1st respondent for the construction and development of a grain handling facility and island berth at G- Section Area Kenya Port Authority, Port of Mombasa was contested; in view of the nature and magnitude of the project in question, it was improper to resort to the **"Specially Permitted Procurement Procedure"** under Section 114A of the Public Procurement and Asset Disposal Act (PPDA) to award the execution thereof to the 1st respondent; the High Court declared the procurement process a nullity for the reason that the process amounted to single sourcing, while the Court of Appeal overturned the declaration, in effect giving the procurement process a clean bill of health; the consolidated appeal as framed raises arguable issues for determination among them, whether

the procurement process undertaken by the 4th respondent met the minimum threshold of Articles 10, 201 and 227 of the Constitution, which lays down national values and principles of governance, principles of public finance, guidelines on procurement of public goods and services. In particular, the 1st applicant submits that the process adopted by the 4th respondent was not fair, equitable, transparent and competitive. The 2nd applicant, for his part, argued that the procurement process was discriminative of the 6th to 10th respondents; and that the appeal is not frivolous since it raises vital and arguable points of law on the violation of the Constitution and other procurement laws; and

[5] FURTHERMORE, on the nugatory aspect, the applicants are apprehensive that should the conservatory orders sought herein be denied, the 1st respondent shall proceed to construct and complete the grain bulk handling facility; that since funding is already disbursed and spent, demolishing the facility will not be an option and is irreversible; that the Portside Companies (1st to 3rd respondents) both before the Court of Appeal and in opposition to this application have indicated the urgency for the commencement of the project and decried the delay caused by the application; that they have entered into credit and financing arrangements in addition to obtaining the relevant statutory approvals and licenses all of which are time bound; consequently, if the orders sought are not granted, the substratum of the appeal when finally listed and heard will be rendered nugatory, a mere academic exercise; and finally, that there is sufficient public interest element in the consolidated appeal as it touches on the procurement process in a public body. For these reasons, the 1st and 2nd applicants urge that they have met the threshold for issuance of the orders sought, as set out in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others,*** SC Civil Application No. 5 of 2014; [2014] eKLR; and

[6] NOTING the 1st applicant's affidavit sworn on 27th May 2024 by Simon Sang, as well as submissions filed on even date in support of the 2nd applicant's Motion

dated 6th May 2024 wherein the 1st applicant reiterates the arguments in its supporting affidavit and submissions in its own Motion; and the 2nd applicant's replying affidavit sworn on 28th May 2024 by Okiya Omtatah Okoiti as well as submissions filed on even date in support of the 1st applicant's Motion dated 7th May 2024; and

[7] FURTHER NOTING the 11th respondent's affidavit sworn on 31st May 2024 by Emily Kinama, the 11th applicant's Litigation Manager with its submissions dated 2nd June 2024 in support of both Motions to the effect that: the appeal is arguable and not frivolous; the Court must allow parties to ventilate the public procurement issues raised to their logical conclusion; if the construction proceeds, the appeal will be rendered nugatory and it is in public interest that the Court preserves the integrity of the appeal as it concerns public procurement; accordingly, it urges the Court to issue the orders; and

[8] UPON REVIEWING the Portside Companies' (1st, 2nd and 3rd respondents) replying affidavit sworn on 5th June 2024 by Yusuf Abubakar, the Director of the 3rd respondent, on behalf of the 1st and 2nd respondents, as well as their submissions dated 5th June 2024 in opposition to both Motions to the effect that: the applicants' consolidated appeal is neither arguable nor will it be rendered nugatory if the reliefs sought are not granted; to the contrary, they submit, the granting of the conservatory orders will further result in delaying the implementation of the project thereby strengthening the present monopoly in the grain handling sectors, resulting in turn to higher food costs not to mention the effect on national food security which is the very premise for the granting of permission by the 4th respondent through the **"Specifically Permitted Procurement Procedure"** which is recognized in law; that it would be unfair, unjust and irrational for a different set of administrative procedures to be applied in the instant case particularly considering that it is common ground that a second facility is an operational necessity; that the project is actually being undertaken on

private land belonging to Portside Companies and the notion that Kenya Ports Authority (KPA), the 4th respondent, awarded Portside Companies a tender to develop and construct a second grain handling terminal as found by the High Court was baseless and without supporting evidence; to the contrary, they submit, this was a private investment made by Portside Companies to be undertaken on its own private property and an island berth off the G-Section area which would be common user by any member of the public unlike the current arrangement for the first entity licensed to handle bulk grain; and that they were equally entitled to the grants of way-leaves and licenses. In any event, it is their position that should the appeal eventually succeed, any overhead conveyor system and the island berth developed by Portside Companies would easily be de-operationalised at no cost to KPA. Whichever way it is considered, they maintain, KPA and by extension the public, stand to gain immensely; and

[9] FURTHER, as regards public interest, Portside Companies posit that from the KPA technical report, KPA stands to earn revenues in excess of Kshs. 1 billion annually; that in addition to revenue lost over the last couple of years, further delays will cost KPA close to Kshs. 1 billion annually in lost revenue; that no security for any loss sustained by the public through KPA is being offered by the applicants yet they profess to advert public interest; and that should the appeal not succeed, KPA and the public stand to lose substantially which is not in public interest. They admit as alleged by the applicants that Portside Companies have already invested substantial sums, entered into credit and financing arrangements and obtained time-bound statutory approvals. Given the foregoing, they submit that it is in the interest of justice that the conservatory reliefs sought be declined; and

[10] COGNIZANT that during case management KPA, a key party, though on record, indicated through its counsel that it would not participate in the appeal and instead opted to silently observe from the sidelines; and

[11] HAVING CONSIDERED the applications, affidavits and rival arguments summarized in the preceding paragraphs **WE NOW OPINE** as follows:

i. To entertain these applications, we must be satisfied in the first place that the consolidated appeal is itself properly before the Court, to clothe it with jurisdiction. From the record, it is apparent that the two petitions lodged in the High Court alleged contravention of fundamental rights and freedoms under Articles 10, 27, 47, 201 and 227 of the Constitution and sought such constitutional reliefs as a declaration that the decision to grant Portside Companies the sole right to implement the second bulk grain facility through Specially Permitted Procurement Procedure under Section 114A of the PPDA was in violation of the aforementioned provisions of the Constitution.

ii. This question remained the predominant theme in the decision of the High Court that triggered the first appeal to the Court of Appeal. The Court of Appeal's judgment was similar on this very question where that court asked and answered the question whether the trial court erred in holding that the invocation of the Specially Permitted Procurement Procedure under Section 144A of the PPDA violated the Constitution.

iii. Based on the foregoing, we entertain no doubt that both the appeals, brought pursuant to Article 163(4)(a) of the Constitution and the present Motions are properly before us.

iv. What is sought in the two Motions before us are interim reliefs. Conservatory orders are tools of preservation intended to protect and safeguard the substratum of the petition of appeal, in this case, the construction of a second bulk grain terminal at the Port of Mombasa, so that the consolidated appeal is not rendered nugatory. Conservatory orders therefore serve to offer short-term relief so as not to expose the Constitution or the appellant to preventable perils pending the determination of the dispute.

v. A conservatory order today is a constitutional relief, specifically provided for under Article 23 of the Constitution, grantable as a matter of judicial discretion.

vi. Conservatory orders have a **'more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies'** as it is meant to secure the enforcement of the provisions of the Constitution and to also uphold the adjudicatory authority of the Court, so that the authority conferred on the courts is not exercised in vain, hence the need to keep the subject matter in dispute *in situ*. See ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*** [2014] eKLR.

vii. The nature and principles to be considered before this Court can grant a conservatory order or a temporary injunction have been crystallized through a long line of this Court's judicial pronouncements, the leading authority being, ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji*** *(supra)*. Those principles are:

a) The Appeal is arguable and not frivolous:

b) Unless the orders sought are granted, the appeal were it to eventually succeed, would be rendered nugatory:

c) That it is in public interest that the conservatory orders be granted.

viii. The question of whether an appeal is arguable, does not call for the interrogation of the merit of the appeal, and the court, at this stage must not make any definitive conclusions of either fact or law. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully at the hearing before the court. Even one arguable point is sufficient to meet this test.

ix. On the nugatory aspect, the concern is whether what is sought to be preserved if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. See the decision of the Court of Appeal in ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others,*** Civil Application No 31 of 2012; [2013] eKLR.

x. As a third ground, this Court in considering an application for conservatory orders cannot ignore the impact of such orders beyond the parties to the case should the order be granted or denied. Consequently, the Court will make a general inquiry as to where the public interest lies, considering the parties' respective rights. All the three conditions, including the third principle, we stress, must be met for an application for conservatory orders to succeed for the reason that conservatory orders have a public law connotation as earlier noted.

xi. Applying these principles to the arguments presented in affidavits and written submissions, we have no difficulty in finding that the issue of whether the procurement process undertaken by the 4th respondent met the minimum threshold of a procurement contemplated under the provisions of Articles 10, 201 and 227 of the Constitution and various provisions of the PPDA warrants this Court's consideration. Among other reasons, this single arguable ground suffices.

xii. On the nugatory aspect, the issue is whether what is sought to be preserved by a conservatory order is reversible. It is common factor that the project in question involves massive capital investment estimated to cost millions of dollars. In their replying affidavit, Portside Companies have estimated their investment to be in the region of USD 45 Million.

xiii. It has been averred for Portside Companies that they have already invested substantial sums and, entered into credit and financing agreements and obtained statutory approvals and licences that are time bound, pointing to

the companies' readiness to commence the construction of the project, if not stopped.

xiv. It is the process of awarding that project to Portside Companies that is under challenge in the consolidated appeal presently pending hearing and determination on merit by this Court. In an application like the one before us, it is the duty of the Court to balance the rights of parties; between the applicants' right of appeal to this Court and that of Portside Companies that have a judgment in their favour, and whose fruits they are presently entitled.

xv. Bearing these factors in mind, we are of the view that should Portside Companies proceed to implement the project, the appeal will be rendered nugatory. In any event, at this stage, we are of the view that a conservatory order will, not only preserve the *status quo* but also save Portside Companies themselves from nugatory expenditure should the appeal succeed. The inconvenience and delay that may be occasioned to them can be compensated by an award of costs. The order prayed for being temporary in nature is not anticipated to last for long going by this Court's record of hearing and disposal of appeals, nothing close to nearly three years, the period the project has stalled following the challenge in the High Court of the procurement process and the award of the licence in **Mombasa Constitutional Petition E045 of 2021.** To obviate any further delay and expense to Portside Companies, and in view of the importance of the project in question to the economy of this country, it is directed that the Registrar shall expeditiously finalize case management procedures for the consolidated appeal to be listed for hearing without delay.

xvi. From the totality of the material before us strictly in respect of these applications, considering that the dispute revolves around public procurement, we believe that the public interest will be served when competing constitutional rights are preserved.

xvii. Accordingly, the order which commends itself to us as the appropriate relief in the circumstances is to preserve the subject matter pending the listing, hearing and determination of the consolidated appeal.

xviii. We are of course alive to the fact that, while the 2nd applicant sought only conservatory orders, the 1st applicant sought both conservatory and temporary injunctive orders. Having reached the conclusion that, the conditions for the grant of conservatory orders have been met, we find no purpose to consider the prayer for temporary injunction.

xix. On costs, the award of the same is discretionary and follows the principle set out by this Court in ***Jasbir Singh Rai & 3 other vs. Tarlochan Singh Rai & 4 others,*** SC Petition No. 4 of 2012; [2014] eKLR that costs follow the event. In the exercise of our discretion, we direct that the costs of the motions shall abide the outcome of the consolidated appeal.

[12] CONSEQUENTLY, and for the reasons aforestated, we make the following Orders:

i. The 1st applicant's Notice of Motion dated 7th May, 2024 and filed on 15th May, 2024; and the 2nd applicant's Notice of Motion dated 6th May, 2024 and filed on 17th May, 2024 are hereby allowed in the following terms:

a) Pending the hearing and determination of the consolidated appeal herein, a Conservatory Order is hereby issued restraining the 1st, 2nd and 3rd respondents from constructing and/or developing a grain handling facility and Island Berth at G-Section, Area belonging to Kenya Ports Authority, Mombasa pursuant to the license granted by the 4th Respondent on 2nd August 2021.

b) Costs of the two motions shall abide the outcome of the consolidated appeal.

ii. ***In view of the public interest in the matter, the delay so far experienced as well as the nature of project in question, we direct that the consolidated appeal,*** **Petition No. E010 of 2024 and Petition No. E011 of 2024,** ***be expeditiously set down for hearing as soon as the Court diary permits.***

It is so ordered

DATED and **DELIVERED** at **NAIROBI** this **26th** day of **July, 2024**.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT OF KENYA

.....	.....
M. K. IBRAHIM	**S.C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA