



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**CONSTITUTIONAL PETITION NO. 9 OF 2016**

**IN THE MATTER OF: ARTICLE 22(1)**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 2,**

**3(1), 20, 22(1), (2), ©, 23(1), (3), 6(2), 40(1), (4), 47(1) & (2), 64,**

**186(3), 187(1) & (2) AND 189(1) & (2) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF SECTION 4, 23, 25, 26, 27**

**AND 28 OF THE INTERGOVERNMENTAL RELATIONS ACT, CAP 5G**

**AND**

**IN THE MATTER OF: FERRIES ACT, CAP 410**

**AND**

**IN THE MATTER OF: KENYA FERRY SERVICES LIMITED**

**BETWEEN**

**KENYA FERRY SERVICES LIMITED.....PETITIONER**

**AND**

**MOMBASA COUNTY GOVERNMENT.....RESPONDENT**

**AND**

**1. ATTORNEY GENERAL for and on behalf of the**

## INTERGOVERNMENTAL RELATIONS TECHNICAL COMMITTEE

### 2. MY SPACE PROPERTIES LTD.....INTERESTED PARTIES

#### JUDGMENT

##### The Petition

1. In a Petition dated and filed on 15<sup>th</sup> March, 2016, the Kenya Ferry Services Limited, (the Petitioner) sought the orders following –

(a) A declaration that the Petitioner's fundamental right to the protection of its property held by law and protection from arbitrary deprivation by the Respondent as well as its right to fair administrative action and fair hearing has been breached;

(b) A declaration that the Respondent's actions to take over functions clearly set out by law from the Petitioner is a **breach of the powers**, duties and obligations as set out under the provisions of the Ferries Act, Chapter 410, Companies Act, Chapter 486, (now repealed) Sessional Paper No. 3, Legal Notice No. 152 of 2013 and the Constitution of Kenya 2010;

(c) A declaration that the decision of the Respondent contained in the letter dated 10<sup>th</sup> February, 2016, to the effect that the Petitioner hands over its functions to the Respondent unconstitutional, and is null and void;

(d) A declaration the power conferred upon the Roads Authority under Ferries Act Cap 410, and the law setting up the Petitioner as a limited liability company supersede and prevail over the Mombasa Port Authority Act and the intended Mombasa Ferries and Harbours Bill 2014, and a further declaration that the Petitioner is not obliged to relinquish its functions;

(e) A prohibitory order prohibiting the Respondent whether by themselves, agents, servants or through any other person purporting to derive title, powers or authority from the Respondent from interfering, taking over, collecting rent or any other levies within the confines of the land belonging to the Petitioner, being land reference numbers M.S./1/1762 & Plot No. M.S.1763;

(f) An order prohibiting the Respondent from taking over the Petitioner's parking areas, waiting bays, terminus, rental space/buildings and advertising space and cease from enforcing any such county laws preventing third parties duly contracted by the Petitioner from carrying out their mandate and cease collecting payments therein;

(g) An order compelling the Respondent to refund to the Petitioner all sums of money collected as rent, gate fees, and rental space fees and advertising space from the 18<sup>th</sup> day of February, 2016, till judgment herein and thereafter until payment in full, and account for such sums or in the alternative, compensate the Petitioner at the rates specified in contracts between it and its agents;

(h) An order compelling the Respondent to refund to the Petitioner all the monies they have collected or been collecting from the Matatu/Bus termini, Business Stalls and Advertising Media space/LED Large Screen Displayers from 18<sup>th</sup> February, 2016, to the date of judgment or compensate the Petitioner at the rates specified in the contracts between the Petitioner and its agents;

(i) The cost of and consequent upon this Petition be paid and borne by the Respondent and all other or

such reliefs as this honourable court may deem just and fit or appropriate to grant.

2. The Petition was supported by the Affidavit of Elijah Kitur, the Company Secretary and Head of Legal Services of the Petitioner sworn on 15<sup>th</sup> March, 2016, and the grounds on the face of the Petition. The Petition was also supported by the Further Affidavit of Elijah Kitur sworn and filed on 28<sup>th</sup> April, 2016, and the Petitioner's Replying Affidavit sworn on 11<sup>th</sup> May, 2016, by the said Elijah Kitur and filed on 17<sup>th</sup> May, 2016.

3. The Petition was further supported by the bundle of documents dated and filed on 15<sup>th</sup> March, 2016. Lastly, the Petition was also grounded upon the written submissions of Mr. Akanga Alera counsel for the Petitioner dated 21<sup>st</sup> June, 2016, and filed on 22<sup>nd</sup> June, 2016.

4. On its part, the Respondent opposed the Petition, **firstly** through the Replying Affidavit sworn and filed on 6<sup>th</sup> May, 2016 and **secondly** by the written submissions of Mr. Kiprop, counsel for the Respondent dated 18<sup>th</sup> July, 2016 and filed on 19<sup>th</sup> July, 2016 together with the authorities attached and referred therein.

### **The Dispute/Issue**

5. The Petitioner herein raises two issues. The **first** issue raised by both the Petitioner and the Respondent is the division of the functions of the national and county governments under the Fourth Schedule to the Constitution of Kenya, 2010 and in particular Part II which confers upon the county Governments the function of **county transport**, including under paragraph 5(e), the function of operating ferries and harbours, **excluding**, the regulation of international and national shipping and matters related thereto. The **second** issue raised concerns the concomitant question of division of assets between the national and county governments.

6. Whereas the Petitioner contends that as an agency of the national government, it is responsible for ferry services, and matters related thereto, the Respondent's reply is that ferries and harbours is a function of the county government. It does not concern itself with the **regulation** of international and national **shipping** and matters related thereto. In order to determine this conundrum, it is necessary to consider in some detail, the claims of both the Petitioner and the Respondent. I will consider the Respondent's claims first.

### **The Respondent's Case**

7. The Respondent's claims that being a County Government created under Article 6(1) of the Constitution of Kenya 2010 (**the Constitution**), it is vested with power under the Fourth Schedule to the Constitution, and in particular sub-paragraph 5(e) of the Constitution, to manage transport and parking within the County of Mombasa, including the management of bus termini and collection of necessary fees and further, to licence, collect revenue and other charges from businesses and other commercial enterprises and to issue permits at a fee for advertisement in all forms including bill boards, banners, display screens or advertisement branded on the vehicles to be created and displayed.

8. The Respondent also claims that the Petition herein is fatally defective and **ex facie** incompetent, bad in law on the ground that the Petition was filed without the Petitioner's authority and that there was no resolution by the Petitioner's Board approving the institution of the Petition. The Respondent consequently contended that the appointment of the Petitioner's counsel's firm of **Akanga Alera & Associates Advocates** to lodge the Petition on behalf of the Petitioner was not valid.

9. On the contract between the Petitioner and the Interested Parties, (M/S My Space Properties Limited and Nova Media Limited) the Respondent contended that these were invalid because they were not executed under seal.

10. It was also the Respondent's contention that the Petitioner was operating a bus/matatu termini, hawkers' stalls and outdoor advertising illegally because the said functions were devolved.

11. On the loss of revenue, the respondent claims that it never demanded the handover of its properties or facilities but were concerned that the Petitioner's actions had led to inefficiencies in the management of the ferries. In other words, the Respondent is saying that it took over the said function from the Petitioner to enable the Petitioner concentrate on ferry operations, and also suggested that it could give assistance to the Petitioner to discharge its duties.

12. The Respondent contends that it took over the functions of the Petitioner on 8<sup>th</sup> February, 2016 in a bid to restore order and increase efficiency in and around Likoni Ferry, and that it did so peacefully and without any altercation, because it is the responsibility of the Respondent to regulate and manage road transport, including Likoni channel.

13. The Respondent also denied the subventions by the national government to the Petitioner as pleaded in paragraph 7 to the Petition, and other sources of revenue as pleaded in paragraphs 7, 8 and 9 of the Supporting Affidavit aforesaid of Elijah Kitur.

14. The Respondent also denied the application or relevance of the letter dated 24<sup>th</sup> February, 2016 by the Transitional Authority to the resolution of the dispute raised by the Petition herein.

15. For all those reasons the Respondent urged the court to dismiss the Petition herein with costs to the Respondent.

### **The Petitioner's Case**

16. As already stated the Petitioner's case is stated in the grounds in Petition and the Supporting Affidavit of Elijah Kitur, the Petitioner's Company Secretary and that the averments in the Petition, save for paragraphs 2, 8, 9 and 19 have not been opposed by the Respondent.

17. The Petitioner's principal case is that the Likoni Channel is an international waterway and water resource that is part of the Country Marine Navigational System which is operated in accordance with the national and international norms as outlined in international treaties and conventions including the **Treaty on Safety of Life at Sea (SOLAS)**, and that this is a function which is squarely placed in the arms of the national government, treaty making being a function of the national government under the Fourth Schedule, paragraph 18(f) – marine navigation.

18. The Petitioner contends that the ferry services offered by the Petitioner include road and foot traffic and management of the landing and approved facilities on both sides of the channel. The Petitioner contends that road transport include commercial trucks, public service vehicles (PSVs), private vehicle, tuk tuk, motor cycles, bicycles and handcarts.

19. The Petitioner also contends that the main source of its revenue is the national government's subventions and grants in line with the provisions of memorandum of understanding between the Petitioner and the national government to compensate the Petitioner for every other person on foot to cross or board the ferry without paying for the service. Counsel for the Petitioner urged the court to take

judicial notice of the existence of such memorandum, (without its being produced).

20. The Petitioner also averred that the national government finances about 70% of the Petitioner's recurrent and 100% of the development expenditure. The Petitioner avers that the 30% shortfall of the current expenditure is financed through revenue collected from facilities developed by the Petitioners for purposes of revenue generation in order to bridge the gap on subventions from the National Treasurer.

21. The Petitioner says that the facilities that have been developed by the Petitioner, include the mainland bus terminals, mainland and island ramps, office and commercial rented space, and the led advertising large screen displays.

22. The Petitioner states that it breaches the 30% shortfall on its recurrent expenditure from the above sources, and charges below commercial rates because it provides essential service to the public, and for the same purpose, it has developed special parking yards and waiting bays for holding vehicles, and thus manage pedestrians and vehicular flow.

23. The Petitioner explains that the parking yards are reserved for lorries, trailers and fuel tankers. The waiting bays are reserved for small vehicles waiting to board ferries. The Petitioner explains that the facilities in Likoni Mainland side stand on Plot No. MS/1/1762 and Plot No. MS/1/1763, which were acquired by the Petitioner in the year 1996 for the sum of Kshs. 6 million, and that the facilities were developed at the cost of KShs. 460,356,235, and include –

- (i) mainland bus/matatu terminus;
- (ii) mainland and inland ramps;
- (iii) mainland approach roads;
- (iv) office and commercial rental space (business (stalls));
- (v) ablution blocks.

24. In addition to the above facilities, the Petitioner also avers that it developed and installed advertising and media space and LED large screen displays on both sides of the channel at a total cost of KShs. 77,682,705/= for the sole purpose of providing safe and secure landing facilities for both vehicular and foot passengers, and to generate revenue to support the shortfall of 30% on its recurrent expenditure.

25. It is also the Petitioner's case that to ensure proper billing of vehicles passing through Likoni Channel all vehicles pass through a weighbridge and toll station. The Petitioner states that the Respondent has taken over both the weighbridge and toll stations.

26. In addition, the Petitioner says, the action of the Respondent has caused the Petitioner to be in breach of an agreement with the Second Interested Party with which the Petitioner had a contract to manage the business of stalls and bus/matatu terminus on its behalf under a contract of three years for a consideration of Kshs. 500,000/= payable to the Petitioner per month.

27. The Petitioner also says that the Respondent's action has caused a breach of contract with another service provider, name **Nova Media Limited** for the management of advertising and media space and LED screen displays at an initial rental of Kshs. 1,040,000/= per month, and which rates were to escalate by 20%, 20%, 10% and 20% in the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> years respectively, and that the fee would

be KShs. 1,812,096 in the 5<sup>th</sup> year and which sum the Petitioner was receiving per month when the Respondent took over the facilities on 20<sup>th</sup> April, 2016.

28. The Petitioner denied the Respondent's contention that it took over the Petitioner's facilities erected and being on Plot Nos. MS/1/1762 and MS/1/1763 on the grounds stated in paragraphs 23 and 25 of the Respondents Affidavit that operating the said facilities on the said plots had led to inefficiencies in the management of the ferries which the Respondent would not allow as it adversely affected the people's lives.

29. The Petitioner cries that it has not been inefficient in its operations of the ferry services. It pleads that it developed the facilities in order to augment the revenue base of the Petitioner and the development had not caused any inefficiencies. The Petitioner also pleads that the Respondent has not channeled any such inefficiencies to Ministry of Transport and Infrastructure of the National Government to which the Respondent is responsible.

30. The Petitioner also states that the Respondent has not denied the takeover of the assets of the Petitioner.

31. On the crux of the matter whether the functions of the Petitioner were devolved to the Respondent under the Fourth Schedule to the Constitution, the Petitioner contended that the First Interested Party together with other stakeholders unbundled the functions of the Petitioner for the purposes of determining whether any were devolved functions to be marked for handing over to the Respondent and it were established that the Petitioner's functions were at the national level but with elements of county government level which required intergovernmental consultations and cooperation considering the following –

- (i) that the Likoni Channel links to National Trunk Road, namely Lunga Lunga – Lamu Road;
- (ii) that the Ferry Services operate on international waters and resources and part of the county marine navigational system;

32. It is also the Petitioner's case that the First Interested Party The Inter-Governmental Relations Technical Committee did in fact advise the Respondent by letter dated 24<sup>th</sup> February, 2016, Ref. TA/6/12, that it had, pursuant to Section 15 of the Sixth Schedule of the Constitution as read with Section 23 and 24 of the Transition to Devolved Government Act 2012, and Kenya Gazette Supplement No. 116, the Transitional Authority approved the transfer of functions specified in the Schedule to the County Government that is the Respondent, with effect from 1<sup>st</sup> August, 2013 (1.08.2013).

33. The Petitioner also pleads that pursuant to Gazette Notice No. 152 of 2013, paragraph 5, the transferred function in respect of the Respondent County's transport included the following –

**(d) "ferries and harbours including development, maintenance and operations of ferries and harbours operating in inland lakes and waters."**

34. The Petitioner consequently pleads that its function and related activities of income generating activities have not been devolved to the Respondent, and that there was of as now, no function of the Petitioner which has been sought by the Respondent and approved by the Technical Committee on Devolution as required by law, and that the Respondent could only take a function which has been devolved, and legislated upon by Parliament.

35. For all those reasons the Petitioner pleads that its Petition be allowed with costs against the Respondent.

### **Issues, Analysis and Conclusions**

36. As indicated in paragraph 4 of this long judgment, the issue raised by the Petition, is who, as between the Petitioner and the Respondent is responsible for the ferry services across the Likoni Channel, Mombasa and indeed the other ocean crossings in and around Mombasa Island, and other areas of the County of Mombasa. That is the primary issue for determination. The other issues are consequential upon determination of that main or primary issue.

37. The other subsidiary, but important consequential issues raised both by both the Petitioner and the Respondent, are –

(a) whether the Petition herein is fatally defective, ex facie, incompetent, bad in law for lack of authority to the under seal;

(b) whether the functions of the Petitioner have been devolved"

(c) whether the Petitioner generates revenue or income from the facilities erected and operating on Plot Nos. MS/1/1762 and MS/1/1763;

(d) whether the take over of the operations and functions of the Petitioner exercised in Plots Nos. MS/1/1762 and MS/1/1763 is unconstitutional;

(e) whether the Respondent has breached the Petitioner's rights to property contrary to Article 40 of the Constitution of Kenya 2010;

(f) whether a Respondent was justified to take over the functions of the Petitioner on grounds of alleged inefficiencies.

38. For good order, I will answer first the question whether the Petitioner herein is fatally defective, ex facie incompetent, bad in law for lack of authority to sue under seal.

39. The answer to this question is simple. The Petitioner is a body corporate both under the Companies Act, (Cap 486, Laws of Kenya, now repealed), and a parastatal under Section 2 of the State Corporations Act, (Cap 446, Laws of Kenya), being a company incorporated under the Companies Act which is wholly owned and controlled by the Government.

40. The legal attributes of a body corporate which is also a state corporation as so defined, is that it has perpetual succession, and in its corporate name be capable of suing and being sued. That there was no initial resolution to institute the Petition or that there was no such resolution is a matter of internal regulation of the Company or in this case the Petitioner. The absence of such a resolution may be a defence to the Petitioner against a claim by a third party. It is no defence by the Respondent to the Petitioner's case. In the absence of fraud or anything untoward, the contention is a technicality which is abhorred by Article 159(d) of the Constitution which enjoins the court to deliver substantial justice, and not be subjected to technicalities of procedure. The Petition herein is therefore neither defective, nor ex facie incompetent, nor bad in law.

41. The other issues (c) (d) (e) and (f), will be answered by consideration of the primary issue, that is to

say who, as between the Petitioner and the Respondent is responsible for operations of the ferries across the Likoni Channel, Mombasa, or indeed the other ferries or ocean crossings in and around Mombasa/Island and other crossings in the County of Mombasa. Put differently, the issue is whether, the ferry service operated by the Petitioner along the Likoni Channel to Lunga Lunga Mombasa–Lamu-trunk Road has been devolved to the County of Mombasa, the Respondent herein.

42. To answer this question the court will consider the relevant provisions of the Constitution, relating to devolution of functions between the national and county governments. Thereafter I will consider the consequential legislation on devolution of those functions, and lastly arrive at final orders on the issues raised by the Petition.

43. **Firstly**, Article 64 of the Constitution provides that the territory of Kenya is divided into the counties specified in the First Schedule, and the Respondent is County No. 1. Article 6(2) provides that governments at the national and county levels are distinct and inter-dependent and are required to conduct their mutual relations on the basis of consultation and cooperation.

44. Article 189 which is part of Chapter Eleven of the Constitution and is titled Part 5 – Relationships between Governments, (Cooperation between national and county governments) provides –

**“189(1) 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.”**

45. Article 186 provides as follows –

**“186(1) 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.**

**(2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.**

**(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.**



**(4) For greater certainty, Parliament may legislate for the Republic on any matter.”**

46. For purpose of Article 186(1) (supra), and the purposes of the Petition and this Judgment, the functions referred to the Fourth Schedule is Item 5(e) titled – County Transport –

“(a) – (d)

**(e) “ferries and harbours excluding the regulation of international and national shipping and matters related thereto.”**

47. The transfer of functions to County Governments is however subject to the provisions of the Transition to Devolved Government Act, (Chapter 265A, Laws of Kenya) enacted pursuant to Articles 186(4) and 189(4) of the Constitution. Sections 23 and 24 of the Transition to Devolved Government provides the criteria and procedure for transfer of functions to County Governments.

48. Pursuant to Section 15 of the Sixth Schedule to the Constitution as read together with Section 23 and 24 of the Transition to Devolved Government Act, 2012, and further to Legal Notice Number 16 of 2016, the Transition Authority approved the transfer of the functions specified in the Schedule to Legal Notice Number 152 of 2013, to the County Government of Mombasa. The transport function is set out in paragraph 5 of the said Schedule and reads –

**“5. County transport including**

**(a) – (c)**

**(d) ferries and harbours including development, maintenance and operation of ferries and harbours operating in inland lakes and waters.”**

49. In my humble opinion, paragraph 5(d) must be read and understood as whole, the function transferred to the Respondent is not merely to operate ferries and harbours, but to operate and maintain ferries and harbours in inland lakes and waters.

50. The Respondent might see this as being very absurd because the Transition Authority knew the existence of the Likoni Channel Ferry which was and is being operated by the Petitioner. The allocation of the function does not clearly include the operation of Likoni Channel Ferry. There is therefore no mistake in the Legal Notice transferring the ferry function in respect of lakes and inland waters but did not refer to the Indian Ocean, for example.

51. The “grab” by the Respondent of the facilities and operations of the Petitioner in support of its core function of operating the deep Likoni Ferry Channel is not only contrary to all the provisions of Transition to Devolved Government Act, 2012, but its outright contrary to Article 40 of the Constitution of Kenya 2010. Article 40 of the Constitution guarantees the right person to own property of any kind whether alone or in association with others in any part of Kenya. The expression “**person**” includes both “**juridical**” and “**natural**” person. The Petitioner herein is a juridical person wholly owned by the national government and its assets and associated facilities and operations are assets, facilities and operations of the national government.

52. Under Article 260 of the Constitution, the expression “**property**” includes any vested or contingent right to or interest in or arising from –

- (a) land, or permanent features on, or improvements to, land;
- (b) goods or personal property;
- (c) intellectual property; or
- (d) money choses in action or negotiable instruments.

53. With respect to the contrary submission by counsel for the Respondents, once a person has developed resources from which it derives income to supplement or otherwise its core functions, a defendant or respondent cannot be heard to argue that it has not deprived that person of the use or income derived from such property. It is with respect, a puerile argument to say, no one has taken the Petitioner's property since after all the Petitioner is still the registered owner of Plot Nos. MS/1/1762 and JMS/1/1763 while in fact the defendant/respondent has deprived the Petitioner of the use and fruits of its investment.

54. It is also a sterile argument to argue that the facilities outside and either side of the channel were not developed in connection with and related to the ferry services offered by the Petitioner.

55. It is not a polite expression to employ in matters of Judgment, but “**gang-ho**” tactics by the Respondents are contrary to the clear provisions of the Constitution such as Article 189(2) (**governments at the national and county government are bound to cooperate**), and 189(3), any disputes between governments (including in my view, national and county levels of government) are required to settle any disputes between them by negotiations through alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. It needs no reminding that under Article 187(2) (b) constitutional responsibility for the performance of the function or exercise of the power remains with the government to which it is assigned by the Fourth Schedule. Transport and communications, including in particular “**marine navigation**” is a matter assigned to the **national government** under paragraph 18(f) of the Fourth Schedule to the Constitution.

56. In the premises, I entirely agree with the conclusion reached by the Chairman of the Transition Authority in his letter dated 24<sup>th</sup> February, 2016 to the Respondents Governor that the actions of the Respondent in taking over the Petitioner's facilities which support its activities were against the letter and spirit of the Constitution of Kenya, 2010, and are therefore unconstitutional.

57. In the circumstances, the Petitioner's Petition dated and filed on 15<sup>th</sup> March, 2016 succeeds and I make the orders and declarations following –

- (1) A declaration that the Petitioner's right to the protection of its property held by law and protected from arbitrary deprivation by the Respondent as well as its right to fair administrative action was breached by the Respondent;
- (2) A declaration that the Respondent's actions to take over the ancillary activities, powers, duties, and obligations of the Petitioner are inconsistent with the Ferries Act Chapter 410, the Companies Act (Cap. 486, now repealed), Legal Notice Number 152 of 2013, and therefore the Constitution of Kenya, 2010;
- (3) A declaration that the Respondents proposed law called Mombasa Port Authority Bill and Mombasa Ports and Harbours Bill 2014 is inconsistent with the provisions of Article 201 and 209(5) of the Constitution of Kenya, 2010, and is and would consequently be null and void in terms of Article 2(4), thereof;

(4) An order directing the Respondent, its servants, agents or other persons to granting the personnel of the Petitioner to take over the operations of the Petitioner's facilities ancillary to functions of the Petitioner as the Likoni Ferry Operator;

(5) An order that pending agreement between the national government and the Respondent, prohibiting the Respondent from interfering, taking over, collecting rent, or any other levies within the confines of the facilities erected and situate on Plot No. MS/1/1762 and MS/1/1763;

(6) Pending agreement between the national government and the Respondent, an order prohibiting the Respondent from taking parking areas, waiting bays, termini, rental space and buildings and advertising space currently or hereafter contracted by the Petitioner to third parties;

(7) An order that the Respondent shall account and refund to the Petitioner all the sums of money collected as rents, gate fees and rental space fees and advertising space from 1<sup>st</sup> February, 2016 till the Judgment herein, and from the date of Judgment with interest (at the rate of Kshs. 1,500,000/= in respect of business stalls, bus/matatu termini next to the mainland ramp), Kshs. 1,040,000/= per month (in respect of advertising and media space, and LED Screen Displayers, escalated to Kshs. 1,812,000/=;

(9) An order for compensation by way of damages at the average rate of Kshs. 2,580,000/= per month in respect of lost revenue from motor vehicles, tuk tuks, motor cycles, bicycles and handcarts using the Petitioner's landing facilities, and termini;

(10) The Respondent shall also pay the Petitioner the costs occasioned by the unconstitutional and unlawful acts of the Respondent;

(11) The Petitioner shall hand over to the Petitioner the complete operations of the Likoni channel Ferry together with all ancillary facilities within fourteen (14) days of the date of this Judgment.

58. There shall be orders accordingly.

**Dated, Signed and Delivered at Mombasa this 28<sup>th</sup> day of November, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Wachira holding brief for Akanga for Petitioner

No Appearance for Respondents

Mr. Kaunda Court Assistant



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