REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 61 OF 2014

KENYA NATIONAL HIGHWAYS AUTHORITY.....APPELLANT

=VERSUS=

PALEAH STORES LIMITED.....1ST RESPONDENT

LUKE GIKUNDA.....2ND RESPONDENT

JACKSON MUNARI KIOKO.....3RD RESPONDENT

(Being an appeal from the Ruling and order of the Honourable T. A. Odera PM in

Mavoko PMCC 285 of 2014 consolidated with 286 and 301 of 2014 delivered on 22.4.2014)

BETWEEN

PALEAH STORES LIMITED.....PLAINTIFF

=VERSUS=

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT

JUDGEMENT

1. The genesis of this appeal was a plaint filed by the 1st Respondent herein, **Paleah Stores Limited,** in Mavoko PMCC No. 285 of 2014 against the appellant herein, **Kenya National Highway Authority**. In the said suit the Respondent averred that it was the owner of motor vehicle registration no. KBU 177W, which on 12th March, 2014, while being driven along Mombasa road was, at Mlolongo area confiscated and detained by the Appellant's employees, agents and or servants at Mlolongo Weigh Bridge grounds. It was the Respondent's contention that that action was illegal and/or unlawful. As a result, the Respondent contended that it had been caused business loss, inconveniences and damage since it was unable to transport the goods on board the said vehicle as scheduled and the said vehicle was put out of business. In the Respondent's view, the said vehicle was making about Kshs 50,000/- per day in profits.

2. Together with the suit, the Respondent filed an application seeking a mandatory injunction compelling the Appellant to release the said motor vehicle pending the hearing and determination of the application and the suit. In support of the said application the Respondent averred that the said vehicle was detained on the allegation of failure to obey the lights at the weighbridge, an allegation which the driver of the said vehicle denied. However, instead of taking action against the driver or owner of the said vehicle, the Appellant's agents detained the vehicle with the goods for trade without any just cause. As a result, the Respondent suffered and continued to suffer great inconveniences, loss and damage unless the court intervened. It was further averred that there was a grave danger of the said vehicle wearing out and wasting in the rainy season. The Respondent was of the view that the Appellant would still be at liberty to take any legal action either against the driver or the owner of the said vehicle.

3. In opposition to the application, the Appellant averred that the said motor vehicle was confiscated on the grounds of transgression. According to the Appellant, on 12th March, 2014, the said vehicle was called in following a signal by the high speed weigh in motion sensor. However, the vehicle passed and was signalled to divert to the weighbridge. However, even after being signalled to do so by a police officer, the vehicle failed to stop and an announcement on the public address system at the control room was made. The said vehicle was chased

along Mombasa Road and was intercepted at Kapa Oil Refineries Limited, was apprehended and returned to the weighbridge and booked in the occurrence book.

4. According to the Appellant, in the exercise of section 15(3) of the Legal Notice No. 86 of 2013, ***The Kenya Roads (Kenya National Highways Authority) Regulations, 2013***, the officers of SGS Kenya Limited, who are contracted by the Appellant to manage and enforce axle load control, ordered the detention of the said vehicle and notified the driver to pay the bypassing/absconding fees of Two Thousand United States Dollars or its equivalent in Kenya Shillings. According to the Appellant, this action was further guided by section 15(4) of the said Legal Notice which prescribes the penalty for failure to adhere to the instructions of the Appellant Authority or Police Officer manning the Weighbridge. However, since the Respondent failed and or refused to pay the said fees, under section 15(5) of the Regulations, the Authority was bound to issue a notice of sale by auction of the said vehicle or cargo.

5. The Appellant therefore was of the view that there was neither exceptional nor special circumstances warranting the grant of a mandatory injunction. Similarly, there case was not a clear one for which the orders sought could be granted.

6. It was agreed by the parties that since the issues raised in the subject application were similar to those raised in Civil Suit Nos. 286 and 301 of 2014 the ruling arising in the subject suit would apply to the other suits. In effect all the three suits were consolidated for the limited purpose of determining the said application.

7. In his ruling delivered on 22nd April, 2014, the subject of this appeal, the learned trial magistrate considered the principles guiding the grant of mandatory injunctions found that under Article 50(1) as read with Article 159(2)(e) of the Constitution, collection of fees or fine for an offence can only be done by a court or tribunal upon fair hearing of the parties to a dispute. He therefore found that the Respondent had established a prima facie case. According to him, in view of the established prima facie breach of the law, it would have been unfair to let the case prolong to full hearing and found that the court had the duty to stop further violation of the rights of the Respondent.

8. While appreciating that the grant of the said prayer would determine the whole case, the learned trial magistrate held that pursuant to Article 159(2)(b), Article 259 of the Constitution and sections 1A and 1B of the ***Civil Procedure Act***, it was enjoined to administer justice without delay and to interpret the Constitution in a progressive manner. The Court therefore proceeded to grant the said prayer with costs and directed that the security deposited by the parties in all the three cases be refunded to them.

9. In this Appeal, the Appellant has raised the following grounds of appeal:

> **1) That the learned magistrate misdirected herself as to the principles for the grant of mandatory injunctions at the interlocutory stage and thus improperly exercised her discretion by allowing the application for injunction.**
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> **2) The learned trial magistrate misdirected herself by holding that the appellant had no possible defence to their actions of detaining the respondents motor vehicle.**
>
> **3) The learned magistrate erred in law and in fact in holding that only courts of law had authority to levy and collect fines.**
>
> **4) The learned magistrate erred in law and in fact in entertaining a challenge to the provisions of the Legal Notice No 86 of 2013 Kenya Roads Act NO 2 of 2007 and by doing so proceeded in a matter it had no jurisdiction to entertain.**
>
> **5) The learned magistrate erred in law and fact by disregarding the submissions and authorities of the appellant which were filed in court.**

10. In support of the said grounds, the Appellant relied on **Kenya Breweries Limited & Another vs. Washingtone O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109** and submitted that the trial magistrate did not set out the exceptional and special circumstances that she had taken into consideration in granting the mandatory injunction. It was submitted that while the respondents could challenge the administrative action of the appellant as per the avenue provided for under the said legal notice, the court had no jurisdiction to entertain a challenge of the Legal Notice 86 of 2013 of the Kenya Roads Act No. 2 of 2007. According to the appellant, the respondents ought to have moved to the superior court to challenge the violation of such rights in terms of Rule 4(1) and 10(1) of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***.

11. It was further submitted based on **Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 others (2016) eKLR**, that the respondents in filing a suit in the subordinate court ought to have issued a notice of commencement of suit as per Section 67 of the ***Kenya Roads Act, 2007***.

12. It was therefore submitted that the learned magistrate erred in law and fact by holding that the respondents right to a fair hearing was violated.

13. The Respondents on their part did not filed any submissions in the matter.

Determination

14. I have considered the submissions made by the appellant in this appeal. This being an interlocutory appeal, care must be taken to obviate expressing a conclusive view of the matter as the respondent's suit is still pending before the Magistrate's Court. The practice is and has always been that at interlocutory stage the court may only express its views in the matters in controversy on a *prima facie* basis. Otherwise a concluded view is likely to tie the hands of the Magistrate who would eventually hear the case, and is likely to embarrass him. See **Mansur Said & Others vs. Najma Surur Rizik Surur Civil Appeal No. 186 of 2005** and **Niazons (K) Limited vs. China Road & Bridge**

Corporation (Kenya) Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502.

15. In my view the only issue for determination before me is whether the injunction granted by the learned trial magistrate ought to have been granted in the circumstances of the case.

16. It is now trite that the court can only grant a mandatory injunction under the provisions of section 3A of the ***Civil Procedure Act*** and not under Order 40 of the ***Civil Procedure Rules***. See **Belle Maison Ltd. vs. Yaya Towers Ltd. Nairobi HCCC No. 2225 of 1992.**

17. In the case of **Kenya Breweries Limited & Another vs. Washingtone O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109** the Court of Appeal stated as follows:

> **"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application…A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."**

18. In fact, **Dickson Mwangi vs. Braeburn Limited T/A Braeside School Civil Appeal No. 12 of 2004 [2004] 2 EA 196** in it was held by the Court of Appeal that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances. In **Gusii Mwalimu Investment Company Ltd. & 2 Others vs. Mwalimu Hotel Kisii Ltd. Civil Appeal No. 160 of 1995 [1995-1998] 2 EA 100** the same Court (**Lakha, JA**) held that:

> **"Whereas the court does have jurisdiction to grant mandatory a injunction even on an interlocutory application, the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant. A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application. On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must *inter alia* feel a high degree of assurance that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction. Each case must depend on its own facts."**

19. In the *locus classicus* case of **Kamau Mucuha vs. The Ripples Ltd. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35** the Court of Appeal expressed itself as hereunder:

> **"Whereas a prohibitory injunction requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection…Historically, the principles laid down with regard to temporary mandatory injunctions are that they will only be granted in exceptional and clearest cases. The grant of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted. If a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done and the plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained…A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for prohibitory injunction."**

20. In this case the learned trial magistrate in her decision was clearly aware of the foregoing principles. With due respect, however, the learned trial magistrate seems to have been of the view that in an application for mandatory injunction, she could make final determination of the issues in the suit. In making findings regarding the powers of the Appellant to impose fines, the violation of the Constitution and breach of the Respondent's rights and ultimately directing that the deposits made be refunded, the learned trial magistrate in effect was determining the main suit with finality without expressly stating so. In fact it was her view that she was enjoined to administer justice without delay and to interpret the Constitution in a progressive manner. In this respect the learned trial magistrate with due respect erred. What the law requires at that stage is the determination as to whether based on the facts presented, the court ***feels*** a high degree of assurance that at the trial it would appear that the injunction had rightly been granted. Having a feeling and being certain are two different things. That is why the authorities state that at the trial it would appear that the injunction was rightly granted meaning that there is still a trial to be conducted. Therefore, whatever decision the learned trial magistrate makes, he/she must always have at the back of his/he mind that a trial is yet to commence and a final determination can only be properly made after parties adduce evidence which is subjected to cross-examination in the normal manner. While it is appreciated that the grant of mandatory injunction invariably determines the suit in as far as the remedies are concerned, such a determination does not amount to determination of the issues in dispute as well, as the learned trial magistrate seemed to have believed in this case.

21. Having said that this being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach an independent

conclusion as to whether to uphold the decision, this was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**. The history of the application as gleaned from the pleadings in the trial court was that the respondents challenged the detention of their 2 motor vehicles for failure to obey lights at the weighbridge. The respondents averred that their vehicles were at risk of wearing out. It was the appellants case that the respondents failed to stop even when signalled by a police officer hence the same was chased and returned to the weighbridge and in exercise of the powers under Section 15(3) of Legal Notice 86 of 2013, the ***Kenya Roads (Kenya National Highways Authority) Regulations, 2013*** the said vehicles were detained subject to payment of the absconding fee, that the respondents failed to pay. It is also their case that the release of the vehicles would have to be subject to the compliance with the provisions of Legal Notice 86 of 2013, the ***Kenya Roads (Kenya National Highways Authority) Regulations, 2013***.

22. An issue was raised regarding the competency of the suit in light of the provisions of Section 67 of the ***Kenya Roads Act, 2007*** which provides that:

> ***"Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-***
>
> ***(a)…….the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent.***

23. Suffice it to say that that was not one of the issues which was placed for determination before the trial court. As a result, it cannot properly be made a basis for determination of this appeal for obvious reasons that its determination requires that a factual finding be made as to whether or not a notice was issued. **Platt, JA** in **Wachira vs. Ndanjeru (1987) KLR 252**, at Page 258 therefore expressed himself as follows:

> **"The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercise unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."**

24. On the merits of the appeal, in most cases where an injunction is sought, the court will be faced with 2 competing interests and ought to come up with a decision that will ensure justice. I associate myself with the position of **Sir John Donaldson MR** in **Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892**, when criticising the 'balance of convenience' principle as enunciated in the House of Lords decision in **American Cynamid vs. Ethicon [1975] AC 396.** The learned Master of Rolls expressed himself as follows:

> **"Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."**

25. In this case the rivalling issues were the Respondent's right to be heard before a fine was imposed against it on one hand and the right of the Appellant to impose fine against the Respondent for the Respondent's transgressions. In my view this was a matter in which a mandatory injunction could be granted on conditions.

26. Accordingly, while I decline to interfere with the decision to grant the mandatory injunction, I however, set aside the order directing the Respondent's deposits to be refunded to them at that stage. Accordingly, the Respondents are hereby directed to deposit in Court Kshs 100,000.00 each within 30 days of service on them of this decision. In default, the case will stand dismissed with costs.

27. As regards the costs of this appeal, none of the parties complied with the directions of this court to furnish the soft copies of their submissions. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

> ***A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

28. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, there will be no order as to the costs of this appeal.

29. I direct that the suit be heard on its merit before any other magistrate with jurisdiction to hear the matter other than **Hon. T. A. Odera**.

30. It is so ordered.

Read, signed and delivered in open Court at Machakos this 10th day of March, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Onkangi for Mr Odhiambo for the Appellant

CA Geoffrey