



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 69 OF 2020**

**YELLOW ARROW EXPRESS LIMITED.....PLAINTIFF**

**-VERSUS-**

**FREDRICK VIGEDI KIVISI.....1<sup>ST</sup> DEFENDANT**

**SCPC(MARIAKANI) SSP EZEKIEL CHEPKWONY .....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The subject matter of this ruling is the motion dated 12<sup>th</sup> May 2020 taken out by yellow Arrow Express Ltd, the plaintiff/ applicant herein, in which it sought for the following orders:

- i. THAT service of this application be dispensed with in the first instance and this application be certified as urgent.**
- ii. THAT motor vehicles trucks, registration numbers KCX 425Y and KCX 426Y belonging to the applicant be forthwith released to the plaintiff/applicant pending the hearing and determination of this application.**
- iii. THAT motor vehicles trucks, registration numbers KCX 425Y and KCX 426Y belonging to the applicant be forthwith released to the plaintiff/applicant pending the hearing and determination of the suit.**
- iv. THAT the County Police Commander of Kwale county be compelled to assist in enforcing the order for the release of the motor vehicle trucks.**
- v. THAT costs of this application be provided for.**

2. The motion is supported by the affidavit of Joseph Muthama.

When served, Fredrick Vigedi Kivisi, the 1<sup>st</sup> defendant/ respondent filed the replying affidavit he swore to oppose the motion. SSP Ezekiel Chepkwony and the Attorney General, being the 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondents did not deem it fit to file any response to the applicant.

3. When the motion came up for interpartes hearing, this court gave directions to have the same disposed of by written submissions.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application.

5. I have further considered the rival written submissions together with the authorities cited by the parties. It is the submission of the plaintiff/applicant that the 1<sup>st</sup> defendant/respondent with the help of the 2<sup>nd</sup> defendant/respondent and without any colour of right wrongfully detained its two trucks registration numbers KCX 425Y and KCX 426Y both of make Mercedes Benz Actros 2542. The plaintiff attached to the affidavit of Joseph Muthama copies of the logbooks showing that the aforesaid trucks are registered in the name of the plaintiff company.

6. The plaintiff further complained that those trucks were seized and detained without any court order therefore the defendants are guilty of

detinue. It was also pointed out that the police are not to be involved in enforcing civil debts. The plaintiff further averred that it never authorized the 1<sup>st</sup> defendant/respondent to take possession of the trucks and that it has never offered them as a security for any debt.

7. The plaintiff also argued that the continued detention of the trucks has led to loss of business since the plaintiff heavily depends on the same to carry out its logistics business. This court was therefore beseeched to issue an order compelling the defendants to forthwith release to the plaintiff pending the hearing and determination of this suit.

8. The 1<sup>st</sup> defendant/respondent averred in his replying affidavit that non-disclosure hence the motion should be dismissed. He stated that the plaintiff approached his company known as Fredrick Petroleum (K) Ltd vide the letter dated 31.10.2019 to fuel its motor vehicles on credit which credit would be settled at the end of every financial month running between the 15<sup>th</sup> day of every month and 16<sup>th</sup> day of each succeeding month.

9. The 1<sup>st</sup> defendant/respondent also stated that the plaintiff was to obtain a bank guarantee for payment of the fuel consumed but when the plaintiff/applicant failed to secure a bank guarantee it authorized the 1<sup>st</sup> defendant's company namely Fredrick Petroleum (K) Ltd, to impound any assets the plaintiff in the event any invoice is paid until payment is made vide a letter dated 4<sup>th</sup> November 2019. The 1<sup>st</sup> defendant further pointed out that the plaintiff issued to Fredrick Petroleum (K) Ltd cheques worth ksh.1,112,304/= which cheques were returned unpaid on two occasions due to insufficient funds in the plaintiff's account.

10. The 1<sup>st</sup> defendant also averred that in his capacity as the Director of Fredrick Petroleum (K) Ltd, he went to Mariakan Police Station armed with the plaintiff's letter dated 4<sup>th</sup> November 2019 to seek for assistance to impound the plaintiff's trucks registration no. KCX 426Y for the unpaid debt. The aforesaid trucks were released to the plaintiff by Mariakani Police Station but were reimposed at the behest of Fredrick Petroleum (K) Ltd while seeking to refuel at a Samburu township. Those trucks have been detained since 25<sup>th</sup> April 2020 due to the outstanding debt. The 1<sup>st</sup> defendant/ respondent has urged this court to dismiss the plaintiff's application.

11. Having considered the material placed before this court together with the rival submissions, it is apparent that what is before this court is an application for temporary injunction.

12. In the case of **Giella =vs= Cassman Brown & Another (1973) E.A 69**, the principles of injunction were restated as follows:

**First**, an applicant must show that he has a prima facie case with a probability of success.

**Secondly**, that an applicant must show the irreparable loss he would suffer if the order for injunction is denied.

**Thirdly**, that where the court is in doubt, the application should be decided on a balance of convenience.

13. On the first principle, the plaintiff/applicant has argued that it has been able to show that it is the registered owner of the suit trucks. It argued that the trucks have never been the property of the respondent. It is not in doubt that trucks registration nos. KCX 425Y and KCX 426Y are registered as owned by Fredrick Petroleum (K) Ltd.

14. It is apparent from the official search at the Registrar of Companies that the 1<sup>st</sup> defendant/respondent is the sole director and shareholder of Fredrick Petroleum (K) Ltd. It is also apparent and not disputed by the plaintiff/applicant that the plaintiff/applicant is indebted to the Fredrick Petroleum (K) Ltd to the tune of ksh.1,112,304/=. The plaintiff/applicant had attempted to settle the aforesaid debt by issuing cheques to the creditor but unfortunately those cheques were returned unpaid for insufficiency of funds in the plaintiff's account.

15. It is further not disputed that the plaintiff had authorized Fredrick Petroleum (K) Ltd to seize any of its assets if the outstanding debt it had with the company remained unpaid. Pursuant to the letter dated 4<sup>th</sup> November 2019, the 1<sup>st</sup> defendant/respondent proceeded to seize and take possession of trucks registration no. KCX 425Y and KCX 426Y. A limited liability company can only act through its directors and authorized officials.

16. The 1<sup>st</sup> defendant/respondent who is the sole director and shareholder of Fredrick Petroleum (K) Ltd took possession of the aforementioned trucks on behalf of the aforesaid company. The plaintiff failed to disclose this fact when it first appeared before this court. It further failed to controvert the facts deponed in the replying affidavit of Fredrick Vigedi Kivisi. In my view the plaintiff has failed to show to this court that it has a prima facie case with a probability of success. Having come to this conclusion, I feel not obliged to consider the other two principles.

17. In the end, I find no merit in the motion dated 12<sup>th</sup> May 2020.

The same is dismissed with costs to the 1<sup>st</sup> respondent.

**Dated, signed and delivered online via Microsoft Teams at Nairobi this 30<sup>th</sup> day of July, 2020.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants