



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL SUIT NO. 10 OF 2017

JOSEPH MUSEMBI.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KITUI.....1ST DEFENDANT

OFFICE OF COUNTY ADMINISTRATOR.....2ND DEFENDANT

NATHAN VUNGO.....3RD DEFENDANT

R U L I N G

1. **Joseph Musembi** filed a Notice of Motion dated the **29th November, 2018** seeking an order that the **OCS Kitui Police Station** be directed to allow him or his duly appointed agents to access the station for purposes of carrying out a valuation on the motor-vehicle registration number **KCC 255Q**.
2. The Application is premised on grounds that the subject lorry was impounded on the **4th December, 2016** by the Defendants and towed to Kitui Police Station where it remains to date. That the lorry has been wasted and it's a mere wreckage. The OCS has on several occasions denied the officers from **Regent Valuers** an opportunity to conduct a valuation of the lorry and the valuation report would be extremely crucial evidence in the ongoing case.
3. The Application is supported by an affidavit sworn by **Joseph Musembi** who deponed *inter alia* that the OCS has been adamant and on several occasions refused valuers to access the motor-vehicle without a Court order.
4. At the hearing of the Application Counsel representing the Defendants in the substantive suit pointed out that the order sought was against a person who was not a party to the suit. That notwithstanding the Applicant insisted on proceeding with the Application. It was urged by learned Counsel **Mr. D. Kithome** that in seeking the orders sought the Applicant relied on the grounds on the face of the Application and the affidavit of **Joseph Musembi**.
5. **Mr. Mwalimu** learned Counsel for the Respondents (Defendants) responded on a point of law. His argument was that orders sought against the Respondents were misdirected as they were against the OCS Kitui who was not a party to the suit. That pleadings at **Paragraph 18** of the Plaint and Paragraph 6 of the Defence confirmed the interest of the police in the matter as the driver of the motor-vehicle was charged in **Criminal Case No. 50 of 2017** and he paid a cash bail of **Kshs. 100,000/=**. He urged the Court to decline to grant the order sought.
6. The Application has been brought pursuant to the provisions of **Section 1A, 1B, 3 and 3A** of the **Civil Procedure Act** that provide as follows:

“1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) 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.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters

presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

These provisions of the law enable the Court to make an order that effectively enables ends of justice to be met.

7. In the case of **Andy Forwarders Services Limited & Another vs. Pricewater House Coopers Limited & Another (2012) eKLR Musinga, J.** (As he then was) stated that:

“A person may be joined not because there is a cause of action against him but because that persons presence is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the matter.”

8. The order sought is to be made against the OCS who is not a party in the suit and/or Application. The **OCS – Kitui** whose inclusion was important being the custodian of the subject motor-vehicle who would have been commanded by the Court to allow the access of the motor-vehicle was a necessary party who should have been a party to the Application.

9. The Complaint raised in the Application is against the **OCS Kitui**, it was a requirement for him to be given not just a hearing but a fair one. In the case of **Baker vs. Canada (Minster of Citizenship & Immigration) 25 CR 817 6** it was held that:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected would have the opportunity to present their case fully and fairly, and have decision affecting their rights, interest or privileges made using a fair impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

10. And in the case of the **Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board HC Civil Misc. Application No. 18 of 2010** the **Ugandan Supreme Court** stated as follows regarding the rules of National Justice:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

11. From the reasoning above, it is apparent that granting the order sought will be tantamount to condemning the **OCS Kitui** unheard. He could be having his reasons of deterring any person from accessing the subject matter which could have been ventilated had he been made a party to the Application. In the premises the Application lacks merit. Accordingly it is dismissed.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 30th day of January, 2019.

L. N. MUTENDE

JUDGE