



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. 24 OF 2018

PRD RIGS KENYA LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT

RULING

1. The cause of action in this suit, according to the Plaintiff arose when the Defendant contracted the plaintiff to repair and maintain the Defendant's drilling rig and sought that the plaintiff supplies the Defendant with various tools and accessories necessary for the drilling of boreholes. As a result, the subject drilling rig was delivered into the possession of the Plaintiff who proceeded to repair, service and maintain the same as per the agreement. The Plaintiff also delivered to the Defendant assorted tools and accessories to enable the drilling of boreholes.

2. It was the Plaintiff's case that the total cost of the repair and value of the said tools and accessories was Kshs 13,066,496.85 out of which the Defendant paid Kshs 3,793,103.45 leaving balance of Kshs 9,273,937.31 unpaid. It is this sum that the plaintiff seeks in this suit as well as the accrued storage charges.

3. In its defence, the defendant, apart from barely denying all the allegations, contended that payments by government are only made when funds are made available by the treasury from the National Government.

4. The subject of this ruling is however, an application dated 6th August, 2019 made by the Defendant in which it seeks an order that the Plaintiff be compelled by way of mandatory injunction to release drilling rig registration number KHMA 138G belonging to the County Government of Machakos. It also seeks the costs of the application.

5. According to the Defendant/Applicant, in the intervening period between the filing of the plaint and this application, the Plaintiff has been holding the Defendant's said drilling Rig registration number KHMA 138G registered in the name of the County Government of Machakos without lawful justification whatsoever. This is despite the fact that the Defendant has demanded severally for the release of the said drilling rig.

6. It was averred that the continued holding of the said drilling rig is in contravention of section 25 of the **Government Proceedings Act** which expressly prohibits the holding of government property as lien for any debt whatsoever. To the Defendant, the law having prohibited the actions of the Plaintiff of holding government property as lien, the Plaintiff is not only conducting itself criminally as to attract charges in a criminal court, but does not also deserve to be heard by this honorable court until the said breach is regularized by releasing the said rig. It was further contended that the continued holding of the drilling rig by the Plaintiff is against public policy and should not be allowed by this honourable court. This is so as the general public stands to suffer great loss with the continued holding of the drilling rig by the Plaintiff since the County Government is now unable to deliver services to the public and also continues to lose income from the lack of user of the said drilling rig being held by the Plaintiff.

7. To the Defendant, any issue/claim the Plaintiff has can be adequately heard and determined in the suit already filed and the holding of the drilling rig as lien is thus unjustified, illegal and unlawful.

8. It was in any case contended that the sums claimed in the Plaint are not justifiable the same having been paid by the Defendant fully and as such no balance is due from the Defendant to the Plaintiff.

9. In a further affidavit, the Defendant averred that the Defendant entered into 2 separate contracts with the Plaintiff, one being for the repair, service and maintenance of the Defendant's drilling rig and another for the delivery of drilling tools and accessories and that the Defendant has fully settled the amounts due and owing to the Plaintiff by remitting the final payment of Kshs. 5,737,351 as per the invoices received from the Plaintiff and therefore the holding of the Defendant's rig after full settlement of the debt due and owing is therefore unwarranted, unlawful and against public policy and in any event, in clear breach of section 25 of the **Government Proceedings Act**.

10. The Defendant contended that the letter alluded to by the Plaintiff dated 25th April 2019 promising to clear the debt due and owing was written on a “without prejudice” basis and does not in any way construe the admission of liability for further remittance of payments to the Plaintiff. In any event, the same had been made before the Defendant reconciled its accounts *vis-à-vis* the invoices received and services rendered by the Plaintiff to it.

11. While the Plaintiff seems to suggest in its response that holding the rig is the only way it can secure payment of the alleged debt due and owing from the Defendant, the Defendant averred that this would suggest that all persons claiming to be owed by the Defendant or any Government entity must have or take possession of government property in order to secure payment of debts due and owing, which is not only absurd but would set a dangerous precedent. The law does not allow the same and it cannot now be made an exception for the Plaintiff herein. All debts due or alleged to be due have to be proved independently through a legal process and only a judgment of a court can be enforced against the government in the prescribed manner allowed in law and not in the manner being used by the Plaintiff. The Plaintiff's actions of holding government property as lien thus remain unlawful and illegal. The law prohibits the same expressly.

12. It was reiterated that the issue of whether or not all the monies have been settled or not is yet to be heard and determined by this Honourable court and the Defendant's position remains that the debt is duly settled in full. In any event, the release of the rig to the Defendant does not extinguish the Plaintiff's claim if any and neither does it preclude the Plaintiff from executing judgment against the Defendant should it be proven that the debt due and owing has not been fully settled as alleged.

13. The Defendant asserted that the law under section 21 of the **Government Proceedings Act** expressly provides the mode of execution against government and in fact prohibits execution or attachment of government property in satisfaction of orders against the Government. Effectively, the continued holding of the said rig now or even after judgment in favour of the Plaintiff if at all, the Plaintiff is precluded from attaching the said rig to recover any debt due.

14. It was averred that the Defendant harbours no ill will against the Plaintiff and has made steps to ensure the Plaintiff is paid its dues despite the harsh environment caused by delayed funding by National Treasury to the County Governments, a matter which the Defendant explained to the Plaintiff on numerous occasions and which issue is in the public domain.

15. In opposing the application, the Plaintiff/Respondent averred that the drilling rig in question was taken for repairs in its garage on around January 2016 and was repaired by June 2016 but the defendant refused to pay for the said repairs in spite of many pleas for the payment and storage cost the Plaintiff were incurring. In the year 2017, the Plaintiff threatened to file suit against the defendant but given that it was an election year, the defendant officers advised that a suit at that material time would be taken as an intended sabotage against re-election of the leadership of the county, and to avoid anybody claiming malice on the suit, the Plaintiff held until year 2018 when after futile following of payments, it commenced this suit against the defendant.

16. However, while this suit was pending, the defendant without any notice (around April 2019) paid a sum of Kshs 5,737,351.00 as partial payment, which payment the Plaintiff learnt about when the defendant advocates wrote to the Plaintiff's advocates vide letter dated 25th April 2019 promising to clear the balance on or before the end of June 2019. Owing to past experience with the defendants on matters payment, the Plaintiff declined the offer and instructed its lawyers to respond to the said letter and insist on full payment before the release of the rig.

17. It was averred that once the defendants realized that the Plaintiff's weren't going to accept their offer to clear the balance in June, they changed tune and turned to issuing threats to have criminal proceedings commenced against the Plaintiff.

18. It was therefore contended that the defendants have not been truthfully always deceitful, one day promising to clear the balance, next day claiming full payment and another threatening police action on us for work done. The Defendant, based on legal advice, averred that the purposes of protection offered to government property under the **Government Proceedings Act** are not to aid a rogue government in stealing from law abiding citizens, as the applicant seems to suggest. This would be completely unconstitutional and the court should not hesitate to find such a n interpretation of the said law as being unconstitutional.

19. It was averred that the drilling rig in question was taken to the Plaintiff's garage for replacement of spoilt spare parts and servicing and the defendant has not paid for those spares and instead they want court to mandatorily compel the Plaintiff to release the said rig when it has not paid for spare parts which would basically mean a court sanctioning theft of the spare parts which will certainly be illogical, absurd, unjust, unconstitutional and irrational. A proper definition of the government property cannot include our unpaid for spares which have been mounted on the drilling rig, otherwise the Plaintiff should be allowed to dismount its spare parts before releasing the drilling rig in the un-working condition it was taken to its garage.

20. It was the Plaintiff's position that had the defendant been a true believer in justice and fairness and if it's true that it is disputing the unpaid amount, then the best option would to have the amount in question deposited either in joint bank account of the advocates or in court (the amount being between five to six million) as security for the spare parts and service rendered before seeking release of the drilling rig. Since the Plaintiff has never bothered to pay for and collect the rig from the year 2011 when it was taken to the Plaintiff's garage, the Plaintiff contended that it is ridiculous for the defendant in effort to defeat justice to now quote public interest.

21. The Plaintiff averred that it was advised by its advocates on record that the constitutional rights and principles supersede any statutory provisions and hence the constitutional right to protection of its property cannot be overridden by any claim of statutory right. According to it, since the spare parts in question are bought with finances obtained as loans from its financiers, any responsible government should be the first to pay such debts and not to subject us to financial stress which it has had to undergo paying for such spare parts and without care by the said government.

22. Its position was that the law should be interpreted in such a way that it balances the interest of the mighty (government) and the weak (private citizens like the plaintiff herein) by ensuring that the weaker parties' rights aren't trampled upon by the stronger parties.

23. The Plaintiff asserted that a mandatory injunction can only issue at interlocutory stage in a clear case and where there exist special circumstances, the defendant defence has just mere trials and the current application is not premised on any grounds in the said defence, further there is no special clear circumstances warranting issuance of the mandatory injunction at this interlocutory stage.

On behalf of the Defendant/Applicant, reliance was placed on section 25(1) of the **Government Proceedings Act**.

24. Based on section 21 of the same Act, it was submitted that in view of the foregoing, it is clear that the Plaintiff is precluded from attaching the said rig in satisfaction of a money decree against the defendant. The plaintiff's options are clearly stated in law. As such, no prejudice will be suffered by the plaintiff and neither will any injustice be visited upon the plaintiff as alleged were it to release the rig as this act does not in any way extinguish the Plaintiffs claim if at all and neither does it stop the plaintiff from realizing the fruits of any monetary judgment against the Defendant is one is so issued. In any event, the continued holding of the rig by the Plaintiff cannot confer to it the right to attach the said rig even were this Honourable court to find that money is in fact owed to the Plaintiff.

25. It was therefore submitted that the Defendant has demonstrated that the continued holding of the rig by the Plaintiff as lien is contrary to the law and that there is a prescribed mode of executing monetary decrees against Government as and when the said decrees are issued.

26. As regards the determination whether the Plaintiff should be ordered to release the rig in its possession even with its claim that there it is still owed money by the Defendant, it was submitted that the principles of issuance of a mandatory injunction are settled in law. According to the Defendant, the considerations for granting interlocutory mandatory injunctions were well stated in the case of Court of Appeal case of **Tom Onyango vs. Mimosa Investments Limited [2017] eKLR**.

27. Reference was also made to the case of **Robai Kadili Agufa & Another vs. Kenya Power & Lighting Co Ltd [2015] eKLR**.

28. Based on the above propositions, it was submitted that the Defendant has demonstrated the special circumstances for issuance of a mandatory injunction. According to the Defendant, the holding of the government rig as lien is illegal and in contravention of the law and should therefore not be sanctioned by this court. Government property cannot be held as lien and thus, the same forms a special and clear case under which the mandatory injunction to release the said government rig can be issued.

29. Furthermore, the continued holding of the said rig by the Plaintiff has denied and continues to deny the government use of the same for the provision of services to the public and as such, public money is being lost and wasted as the rig continues to be held at the Plaintiffs yard. It is also deteriorating and thus important and a matter of urgency that the same be released to the Defendant pending the hearing and determination of other issues as raised by the Plaintiff at the trial. The Plaintiffs claim is only for monies allegedly due to it for services provided and as such, does not warrant the holding of the rig as lien. The Plaintiff is yet to prove its case to the court.

30. The Defendant submits that the prayer to have the rig released is not an attempt to steal a march on the Plaintiff as the Plaintiff's claim, if at all, against the Defendant is not extinguished by release of the said rig and it can still execute a monetary decree against the Defendant if one is issued by this Honourable court and therefore no injustice will be suffered by the Plaintiff.

31. In conclusion the Defendant prayed that the rig be released and that the outstanding issues proceed to trial for hearing and determination.

32. On the part of the Plaintiff, it was submitted that when a litigant comes to court, they have reasonable expectation that the court will be a neutral arbiter, by the defendant asking the court to mandatorily compel release of the drilling rig before the hearing of the main suit and without security for the unpaid sums, it would be asking the court to take sides in favour of the defendant before hearing both sides. It was submitted that the court should decline that invitation by the defendant by maintaining the status quo pending a hearing on merit and of both sides. The alternative is to have the unpaid amount being deposited in court as security before release of the drilling rig.

33. It was submitted that principles for granting of mandatory injunction at the interlocutory stage is well settled: that there must be in existence very special circumstances which are outright to persuade a court to grant mandatory injunction at an interlocutory stage. To the Plaintiff with the existing circumstances of this case, nothing is so special or novel to persuade your lordship to consider granting mandatory injunction at the interlocutory stage.

34. In the circumstances, the court was urged to find the defendant/applicant notice of motion dated 6th August 2019 to be lacking in merit and dismiss the same with costs.

Determination

35. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions made and the authorities relied upon and this is the view I form of the matter.

36. It is clear that what the Defendant seeks in this application is the grant of an order in the nature of mandatory injunction. The principles guiding the grant of mandatory injunctions at an interlocutory stage are now well settled. 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**.

37. In the case of **Kenya Breweries Limited & Another vs. Washington 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.” [Emphasis provided].

38. 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.”

39. 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.”

40. In this case the Plaintiff’s cause of action is contractual in nature. Notwithstanding the Plaintiff’s claim for the balance of the sum due to it in respect of the subject contract, the Plaintiff is holding the subject drilling rig belonging to the Defendant as a lien in respect of its dues arising from the said contract. With respect to the exercise of the right to a lien, a general lien and a particular lien are both categories of a legal lien and a lien is a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. See *Halsbury’s Laws of England (4th Ed) Para 502 at 221* and Unibilt Kenya Ltd (Under Receivership) vs. Mukhi and Sons Ltd [2004] 2 EA 340.

41. It is therefore clear that a lien is a possessory right as opposed to a proprietary right. Where therefore a person who would otherwise have a right of a lien over a property legally loses possession thereof it has been held that the lien is lost. In Dhanji vs. Machani Dar-Es-Salaam HCMCC No. 34 of 1969 Georges, CJ held:

“The right conferred by section 173 is a right of retention of things received by an agent and there can be no retention unless there has been possession in the first place. Therefore under section 173, as under the English Law, a lien cannot exist unless the lien-holder is in possession. A legal lien is lost if possession is lost, so that redelivery of the goods to the owner or his agent destroys the lien and when once made cannot be recalled, even if made by mistake; but if redelivery is induced by fraud or otherwise wrongfully obtained the lien revives if possession is recovered, even though the recovery is effected by a stratagem. There is no such a thing as a notional lien and the court has no power to allow an applicant to part with possession while retaining his rights as a holder of a legal lien... It would appear that a lien can be based only on possession of the property over which it is claimed and the right to retain it. It confers no right to sell the property and if the owner takes possession by fraud the lien-holder would have the right to retake possession and, if successful, could not be sued in detinue by the owner.”

42. In this case, there is no doubt at all that the subject rig was handed over to the Plaintiff for repair. It has not been contended that it has not been repaired otherwise the Defendant would not be lamenting that it requires the same in order to undertake its obligations to the public. The Defendant however, avers that the right to lien is expressly forbidden when it comes to government properties pursuant to section 25(1) of the *Government Proceedings Act*. That the said statute applies to the Defendant herein is no longer in doubt. Though neither the *Government Proceedings Act* nor the *County Governments Act* define the term “Government” and Article 258 of the Constitution also does not define the term “Government”, section 2 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya, provides that:

“the Government” means the Government of Kenya

43. Article 189(1)(a) of the Constitution provides that Government at either level shall 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. In my view a holistic approach to this provision would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in the spirit of co-operation and complementarity. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution.

44. Although the provisions of the *Government Proceedings Act* do not expressly refer to County Governments, section 7 of the Sixth Schedule to the *Constitution (Transitional and Consequential Provisions)* provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

45. It follows that the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to the manner in which legal proceedings are to be commenced against them. It follows that the provisions of the *Government Proceedings Act*, no doubt, apply with as much force to the County Governments as they apply to the National Government.

46. Section 25(1) of the *Government Proceedings Act* provides that:

“Nothing in this Act shall authorize proceedings in rem in respect of any claim against the Government, or the arrest, detention or sale of any Government ship or aircraft, or of any cargo or other property belonging to the Government, or give to any person any lien on any such ship, aircraft, cargo or other property.”

47. A holistic reading of the said provision reveals, *inter alia*, that arrest, detention or sale of any Government ship or aircraft is legally forbidden. Similarly, forbidden is the giving of any such property to any person as a lien. In other words, Government property cannot be the subject of a lien. The rationale for this, in my view, is akin to the proposition **with respect to the issue of immunity. In *Kisya Investments Ltd vs. Attorney General & Another* [2005] 1 KLR 74, the rationale for immunity against execution against the Government in the ordinary manner was explained by Ibrahim and Visram, JJ (as they were) in the following terms:**

“Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable...History and rationale of Government’s immunity from execution arises from the following...Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government’s expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered. *SEE HALSBURY’S LAWS OF ENGLAND 4TH EDN VOL. 11 PARA 970, 971 AND 1370.* As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure. *SEE AUCKLAND HARBOUR BOARD VS.R (1924) AC 318, 326.* The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their “own” funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer’s hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it’s Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property.”

48. It is therefore clear that apart from the fact even in cases where a debtor has successfully obtained a judgement against the government, the law recognises that due to the special role played and the central position held by the Government both national and county in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented.

49. That being the position, the holding of Government property pursuant to a lien is expressly illegal. Where an act is expressed to be unlawful, it is my view, that its commission amounts to exceptional and special circumstances for the purposes of mandatory injunction.

50. Apart from the foregoing, according to **Unibilt Kenya Ltd (Under Receivership) vs. Mukhi and Sons Ltd [2004] 2 EA 340:**

“a legal lien is a right of defence and not a right of action and saving special cases does not give any right to sell the thing retained...The doctrine of election would apply if the filing of the suit would substitute the defendant’s lien on the plaintiff’s cargo or if the filing of the suit would be inconsistent with the defendant’s lien on the cargo.”

51. In the circumstances of this case, the Plaintiff having, rightfully in my view, opted to file a suit for the balance of the amount due to it, ought not at the same time, contrary to the express provisions of the law, continue holding the Defendant’s drilling rig. In the premises, I find merit in the application dated 6th August, 2019.

Order

52. Consequently, I hereby issue a mandatory injunction directed to the Plaintiff to release to the Defendant drilling rig registration number KHMA 138G belonging to the County Government of Machakos.

53. The costs of this application will be in the cause.

54. It is so ordered.

Ruling read, signed and delivered at Machakos this 24th day of September, 2019.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Muli for Mr Kimathi for the Plaintiff/Respondent

Mr Mutua for the Defendant/Applicant

CA Geoffrey