



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL CASE NO. 1 OF 2017**

**JOSIAH ONYANGO OKELLO**

**t/a CARGO SECURED SERVICES.....PLAINTIFF**

**-VERSUS-**

**1. MIGORI COUNTY GOVERNMENT**

**2. MINISTER FOR TRANSPORT MIGORI**

**COUNTY GOVERNMENT.....DEFENDANTS**

**JUDGMENT**

**Introduction:**

1. This case brings into focus the operations of a devolved unit as yielded under the **Constitution. Article 174** of the **Constitution** sets out the objectives of devolution whereas **Article 175** of the **Constitution** sets out the guiding principles of the devolved governments. **Article 176** of the **Constitution** creates the county governments to comprise of the county executive committees and the county assembly and **Article 179** of the **Constitution** sets out the composition of the county executive committees. It is **Section 6** of the **County Government Act**, No. 17 of 2012 (hereinafter referred to as '**the CGA**') which seals the corporate identity and perpetual nature of the county governments.

2. The Plaintiff herein, Josiah Onyango Okello, instituted a case against the County Government of Migori and its County Executive Committee Member in-charge of Transport on account of how the officers of the County Government handled his motor vehicle registration number KCB 262X make Mercedes Benz Prime Mover together with a trailer attached thereto which was registered as ZE 9242. I will henceforth refer to the same as '**the motor vehicle**'.

3. The claim was vehemently resisted by the Defendants who denied liability and prayed that the same be dismissed with costs.

**The Plaintiff's case:**

4. The Plaintiff's claim is anchored in the Plaint dated 13/01/2017 and filed on 16/01/2017. The Plaintiff averred that he is a businessman in the transport industry and jointly owned the motor vehicle with a financier, Housing Finance Corporation, which motor vehicle he used in discharging various contractual obligations. That, on 07/09/2015 the motor vehicle while lawfully discharging some duties within Nyatike Sub-County in the jurisdiction of the County Government of Migori was impounded by the officers of the Defendants on allegations of illegally participating in some mineral trade. That, the Defendants through their officers caused the motor vehicle to be parked at the County headquarters and so detained it thereon for a period of two months and then unconditionally released it. He listed five particulars of illegality on the part of the Defendants.

5. The Plaintiff further averred that he suffered great losses during the period which the motor vehicle was impounded. That, his businesses collapsed, contracts were terminated, and he could not service the loan he had been advanced by the financier thereby leading to the repossession and disposal of the motor vehicle together with one of his other vehicle registration number KBK 294C make Mercedes Benz Prime Mover which he had used as a further collateral in the financing arrangement. That, he was blacklisted by the Credit Reference Bureau as a loan defaulter and that he has since lived a very miserable life having lost all what he depended on in his life.

6. The Plaintiff quantified the loss and sought recovery thereof accordingly. He claimed Kshs. 13,250,000/= in respect to the loss of business and income at the rate of Kshs. 250,000/= per day from 07/09/2015 and end of October 2015. He also claimed Kshs. 13,000,000/= as the value of the motor vehicle and Kshs. 5,500,000/= as the value of the motor vehicle number KBK 294X. The Plaintiff further claimed the loss of two-years contract earnings with Star Brilliant EPZ (K) Limited at Kshs. 37,999,992/= and loss of income for his four drivers for a period

of two years at Kshs. 3,840,000/=.

7. Further to the foregone, the Plaintiff prayed for a declaration that the impounding of the motor vehicle was illegal, null and void, general damages, interests and costs of the suit.

8. Alongside the plaint, the Plaintiff filed a statement dated 13/01/2017 and a List of Documents.

9. The Plaintiff testified and called one witness. The Plaintiff reiterated the contents of the Plaint and took the Court through how the events unfolded. He produced 17 exhibits in support of his case. He emphasized that there was no justification in impounding the motor vehicle and that all the loss he incurred must be made good by the Defendants. The driver who was in-charge of the motor vehicle testified as **PW1**. He was one Fredrick Omondi Wire. Since he had also filed a statement, he fully relied on it.

10. PW1 stated that on 03/09/2015 he loaded the motor vehicle with salt at Mombasa and was destined for Isebania town within Migori County. That, he left Mombasa on 04/09/2015 and safely arrived in Isebania town on 05/09/2015. That, the cargo was offloaded on 06/09/2015. During the offloading PW1 was called by the Plaintiff and directed to collect some cargo at Nyatike the following day before returning to Mombasa. That, he arrived at Nyatike at around 10:30 am and called the Plaintiff on where he was to collect the cargo. He was informed that he was to collect some mineral ore and asked to find out and pay any Cess payments to the County Government of Migori. PW1 so found out how much the Cess was from the officials of the County Government of Migori who were at Nyatike and paid. He was issued with a Receipt No. 509 dated 07/09/2017 for Kshs. 4,000/=. The receipt was produced as Exhibit 17. That, he proceeded and parked the motor vehicle next to the Nyatike Police Station where the cargo was to be loaded.

11. After about two hours, PW1 saw two vehicles from the County Government of Migori driven and parked next to the motor vehicle. They had six occupants two of them being armed police officers in uniform and the rest introduced themselves to him as officers of the County Government of Migori led by one Mr. Oballa. The County Government officers told PW1 that he was intending to take part in an illegal business and impounded the motor vehicle. They ordered him to and drove the motor vehicle to the Migori County Headquarters where the said Mr. Oballa took the motor vehicle keys. PW1 was however released and briefed the Plaintiff accordingly who promised to travel to Migori town shortly. PW1 waited for the Plaintiff in Migori town.

12. The Plaintiff arrived in Migori in the morning of 09/09/2015 and held a meeting with PW1 before proceeding to meet the county officials. After unsuccessful deliberations, the Plaintiff sought for legal intervention and his then Counsels formally wrote to the County Government of Migori seeking the release of the motor vehicle. That was vide the letter dated 14/09/2015 by Messrs. Anyango Ogutu & Company Advocates addressed to the County Secretary. There being no response after around two weeks, the said firm of Advocates wrote another letter to the County Secretary on the issue. The letter was dated 28/09/2016 (*sic*) and was received on 30/09/2015. Both letters were produced as exhibit 1.

13. It was the further Plaintiff's case that the County Government of Migori formally responded to his demand vide its letter dated 29/09/2015 which was authored by one T. Kwanga, the Legal Advisor to the Governor. The letter was produced as exhibit 2. That, the letter revealed the twin reasons for impounding the motor vehicle; that the vehicle was found transporting mineral ore within the County without the requisite license contrary to the **Mining Act, Cap. 306** of the Laws of Kenya and that the Plaintiff was found prospecting and mining without paying the requisite royalties to the County Government. That, the driver dumped the vehicle within the county Government premises when he was ordered to pay the requisite royalties.

14. The Plaintiff further averred that he had long suffered colossal losses when the Defendants released the motor vehicle on 24/10/2015. The Plaintiff then filed this suit.

#### **The Defendants' cases:**

15. The Defendants were jointly represented by the same firm of Advocates. They filed a joint Statement of Defence and denied all the factual issues raised by the Plaintiff on the motor vehicle. One witness testified on behalf of the Defendants. He was the County Secretary one Christopher Rusana whom I will refer to as **DW1** in this judgment. He also filed a statement on 03/10/2017.

16. In his statement DW1 stated that he only saw the motor vehicle parked within the county government premises and made inquiries which led him to know that the driver had driven, parked and left the motor vehicle there. That, the driver had been asked to avail evidence of payment of royalties or license fees in compliance with **Section 11** of the **Minerals Act** and never returned. That, the driver only produced the Cess receipt when he turned up to collect the lorry and was allowed to collect the same. To DW1, had the Defendants impounded the motor vehicle then it would have handed it over to the police and liaised with the Office of the Director of Public Prosecutions accordingly. He dismissed the Plaintiff's claim and urged this Court to reject the suit with costs.

17. In his testimony before Court DW1 stated that the motor vehicle was released on the production of an original Cess Receipt which receipt is usually issued for goods leaving the County. That, the driver did not have the receipt when he was asked for one by the County officials and that is why he left the vehicle in the County yard as he went for the receipt. That, what happened was a normal occurrence to drivers who had no such receipts.

18. During cross-examination, DW1 reiterated that the motor vehicle was not impounded by the County officials as alleged, but it was the driver who decided to park it as he went for the Cess receipt. That, Cess and License mean the same thing and that the letter by the County Government did not mention payment of Cess but licenses. That, he was aware that the driver paid the royalties which were demanded and was issued with the receipt which was produced as Exhibit 17. That, the driver did not however show the receipt to the County enforcement officers when he was asked to do so. DW1 confirmed that the driver complied with the last paragraph of the letter by the County Government before he could drive off the motor vehicle.

19. At the close of the parties' cases, written submissions were filed and exchanged.

**The Plaintiff's submissions:**

20. The Plaintiff filed his final submissions on 08/01/2018 where he took the Court through the evidence as tendered. He submitted on how the losses were occasioned by the illegal impoundment of the motor vehicle. The Plaintiff vehemently submitted that the Defendants did not have the powers to impound the motor vehicle on allegations of non-compliance with the **Minerals Act** as that was the mandate of the National Government under the **Fourth Schedule** of the **Constitution**. That, even in cases of such breach, the law did not permit the cessation of property but issuance of demand notices to the defaulter. It was further submitted that the Defendants were not legally empowered to collect any royalties from any prospecting or mining business.

21. In buttressing his submissions, the Plaintiff relied on the persuasive decision of **Mombasa Development & Another vs. The Attorney General & 2 others (2000) eKLR** where the Court overruled the argument that damages in the nature of prospective loss of business profit and earnings were remote and speculative. He also relied on Clark and Lindsell on Tort and the Halsbury's Laws of England.

**The Defendants' submissions:**

22. The Defendants' joint submissions were filed on 06/03/2018. The Defendants reiterated that it was within their right to ask for and be availed with payment for royalties and licenses and that when the request was made to PW1 who did not have such proof of payment he decided to park the motor vehicle within the Defendants premises as he went to collect the receipts. That, the Defendants' officials did not impound the motor vehicle at any point in time.

23. The Defendants further submitted that the Plaintiff had failed to prove his entitlement to the special damages and prayed that the request be dismissed. It was submitted that the loss of income for the four drivers at the rate of Kshs. 40,000/= monthly per driver was only pleaded but not proved. The Defendants further submitted in the alternative that if at all the drivers were to be paid then they were entitled to only one month's salary being the requisite notice period on termination of contract under the Employment Act.

24. On the loss of business, the Defendants submitted that the Plaintiff was only entitled to recover for the period the motor vehicle was under attachment which was 49 days but not the 53 days as claimed in the Plaintiff and in evidence. On the value of the motor vehicles, the Defendants submitted that the Plaintiff is only entitled to the value disclosed in the Valuation Reports and not the ones claimed in the Plaintiff and in evidence. On the loss of earnings because of the cancellation of the contract between the Plaintiff and Star Brilliant EPZ (K) Limited, the Defendants submitted that the Plaintiff was only entitled to what he would have earned for the remainder period which was 22 months and not the entire 24 months. All in all, the Defendants prayed that the suit be dismissed with costs.

**Analysis and Determinations:**

25. This Court has given this matter a careful and keen consideration. To that end it has perused and understood the pleadings, the proceedings, the written submissions, the highlights to the written submissions and to all the decisions and scholarly works tendered.

26. As a starting point, this Court will frame the issues for determination since it was only the Plaintiff who filed his own issues. From the foregone consideration of the record, the following issues are hereby framed for determination: -

- a) **Whether the Plaintiff owned the motor vehicle registration numbers KCB 262X/ZE 9242 and KBK 294C and if so in what capacities;**
- b) **If the answer to (a) above is in the affirmative, whether the motor vehicles were subject of any contracts;**
- c) **Whether the motor vehicle registration number KCB 262X/ZE 9242 was impounded by the Defendants as alleged and if so whether there was any lawful justification;**
- d) **If the answer to the first limb of (c) above is in the affirmative and the answer to the second limb of (c) above is in the negative, whether there was any effect on the motor vehicles and on the contracts the motor vehicles were subject to; and**
- e) **Did the Plaintiff suffer any loss and if so, is he entitled to the prayers sought in the Plaintiff?**

I will deal with the issues hereinbelow.

**(a) Whether the Plaintiff owned the motor vehicle registration numbers KCB 262X/ZE 9242 and KBK 294C and if so in what capacities:**

27. There is evidence on the ownership of the two vehicles. Exhibit 14 is a copy of the Registration Certificate (*also known as 'Logbook'*) for the motor vehicle whereas Exhibit 13 is a copy of the Registration Certificate or Logbook for the trailer ZE 9242. Both the motor vehicle and the trailer are registered in the joint names of the Plaintiff and Housing Finance Co. of Kenya. Exhibit 8 is a letter of approval by the Housing Finance Co. of Kenya to the Plaintiff for a Hire Purchase Finance Facility for the motor vehicle at 67.7% of the value. The balance was raised by the Plaintiff. The letter is dated 18/12/2014.

28. Exhibit 9 is a letter of approval by the Housing Finance Co. of Kenya to the Plaintiff for a Hire Purchase Finance Facility for the trailer at 60% of the value whereas the balance was raised by the Plaintiff. The letter is also dated 18/12/2014. The exhibits reveal that the purchase of

both the motor vehicle and the trailer were to a large extent financed by Housing Finance Co. of Kenya hence the joint registration of ownership.

29. On the other hand, motor vehicle registration number KBK 294C was registered in the Plaintiff's sole name as per the Registration Certificate produced as part of Exhibit 15 but it was used as a collateral to the financial advancements made to the Plaintiff by the Housing Finance Co. of Kenya.

30. The foregone therefore settles the first issue.

**b) Whether the motor vehicles were subject of any contracts:**

31. The Plaintiff contended that the motor vehicles were subject of three contracts at the time the motor vehicle was impounded. The Defendants denied as such. I will hence ascertain the then status.

32. The first contract was allegedly between the Plaintiff and Star Brilliant EPZ (K) Limited. The Plaintiff produced the contract document dated 01/07/2015 as an exhibit. It was a contract for transportation of containers for meat and hides and skins from Naivasha to the Kilindini Port in Mombasa for a period of two years commencing on 01/07/2015. The contract provided for transportation of 5 containers per month at the rate of Kshs. 316,000/- per container. In furtherance to the contract the Plaintiff forwarded copies of the Registration Certificates and comprehensive Insurance Certificates of the vehicles to be used during the contract. Star Brilliant EPZ (K) Limited (hereinafter referred to as '**the Star Company**') acknowledged receipt of the said documents vide its letter dated 05/06/2015 which was produced as Exhibit 3. Among the vehicles to be used during the contract period included the motor vehicle and the vehicle registration number KBK 294C.

33. The Plaintiff also produced his financial statements from his Bankers; Barclays Bank of Kenya Limited, for the period from 01/01/2014 to 31/12/2015 as evidence of payment under the contract. The statements were produced as Exhibits 5.

34. I have carefully perused the exhibits on this contract. I am persuaded to find that there was indeed a valid contract between the Plaintiff and the star company whose terms were reduced into writing. However, the financial statements do not provide any evidence of payment during the contract period, but nevertheless that does not vitiate the validity of the contract.

35. The second contract was allegedly between the Plaintiff and Krystalline Salt Limited. It was not reduced into writing. The Plaintiff stated that since the contract he had with the Star Company was in respect of the transportation of only 5 containers monthly that did not engage his motor vehicles all the time. That, the Plaintiff used to transport salt from Gongoni in Kilifi County in Kenya to Jinja in Uganda as well. That, the vehicles would make at least 10 trips monthly and that he used to earn Kshs. 300,000/= per single trip from Gongoni to Jinja and that the return journey would earn him Kshs. 180,000/= on average. That, for a return journey to and from Uganda he was assured of Kshs. 480,000/=.

36. The Plaintiff produced delivery notes from Krystalline Salt Limited (hereinafter referred to as '**the Salt Company**') in respect to the motor vehicle. They are Exhibits 6(a) to (i) which were all issued in July 2015 save one which was issued in June 2015 in confirmation of delivery of the goods at Jinja in Uganda from Gongoni in Kenya.

37. Based on the Plaintiff's testimony and the delivery notes produced as exhibits, this Court is persuaded on a balance of probability that there existed a contract between the Plaintiff and the Salt Company towards transportation of salt from Gongoni in Kenya to Jinja in Uganda in respect to the motor vehicle herein.

38. The third contract was allegedly between the Plaintiff and some four drivers who used to drive the two vehicles. One of the drivers testified as PW1. Since the vehicles can only be managed by drivers in discharging the responsibilities as those under the contracts herein, there is no doubt that there existed contracts between the Plaintiff and the drivers.

39. As I come to the end of this issue, I must mention the existence of the contract between the Plaintiff and the Housing Finance Co. Limited (hereinafter referred to as '**the Financier**') towards financing the purchase of the motor vehicle which contract treated the vehicle registration number KBK 294C as a collateral.

40. This Court therefore finds and holds that the Plaintiff had engaged the two vehicles into four valid contracts.

**(c) Whether the motor vehicle registration number KCB 262X/ZE 9242 was impounded by the Defendants as alleged and if so whether there was any lawful justification:**

41. Whereas the Plaintiff contended that the motor vehicle was impounded by the Defendants' agents and/or staff, the Defendants vehemently denied such. DW1 testified and strenuously denied the allegation.

42. The Defendants position on the issue is mainly two-fold: First, they contended that when PW1 failed to produce the Cess receipt to the County enforcement officers he decided to park the motor vehicle within the Defendants' premises as he went to get the said receipt. That was the evidence of DW1. The Defendant's letter dated 29/09/2015 which was produced as Exhibit 2 also had several reasons being: That, the vehicle was found transporting mineral ore from the County to Nairobi without a mineral trading license contrary to the Mining Act and the County legislation; that the Plaintiff had not paid the requisite royalties; that, the Plaintiff was found prospecting and mining within the jurisdiction of the first Defendant without paying the requisite royalties to the first Defendant; that PW1 decided to dump the motor vehicle within the Defendants' premises and left upon asked to pay the royalties. Further, Exhibit 2 stated in part that '*.....your client is advised to declare the mineral ore in his possession and show proof of licensing and thereafter pay what is due to the County Government before the motor vehicle and the mineral ore can be released.*'

43. I believe Exhibit 2 settles the question as to whether the motor vehicle was impounded. The letter certainly stated that the motor vehicle was to be released by the Defendants upon the Plaintiff declaring the mineral ore in his possession, produces a valid license and settles all dues payable to the Defendants. Exhibit 2 was the Defendants' letter in response to the Plaintiff's formal demand on the release of the motor vehicle. It was written by the Legal Advisor to the County Governor on behalf of the Defendants.

44. There was also the evidence of the Plaintiff and PW1 on the issue as well. The Plaintiff stated that upon learning of the impoundment of the motor vehicle from PW1 on 07/09/2015 he personally travelled to Migori and met PW1 on 09/09/2015 before meeting the Defendants' representatives. That, the Plaintiff did not manage to secure the release of the motor vehicle from the Defendants and sought legal advice from his then Advocates in Nairobi. The evidence of the Plaintiff was corroborated by PW1 who narrated how he ended up in the hands of the Defendants' enforcement officers and ordered to drive the motor vehicle from Nyatike to the County headquarters in Migori town. That, he was ordered to park the motor vehicle in front of the Governor's office and the keys were collected by one Mr. Oballa who was heading the operation on allegations that the motor vehicle was intended to be used in an illegal business.

45. On failure to secure the release of the motor vehicle the Plaintiff instructed his Advocates who formally wrote to the Defendants demanding the release thereof. That is evidenced by the two letters which were produced as Exhibit 1. The letters are clear that the Defendants had impounded the motor vehicle and that the same ought to be unconditionally released. The said letters elicited the response in Exhibit 2 which also clearly gave the reasons why the motor vehicle was not about to be released by the Defendants.

46. The position taken by the Defendants on the issue is therefore two-fold. On one hand they contend that the motor vehicle was not impounded but was abandoned by PW1 in their parking yard. On the other hand, they contend that the motor vehicle could only be released from their custody upon satisfaction of some conditions. The Defendants' evidence on the issue is hence inconsistent and leaves one to wonder as to the exact position of the Defendants on the matter. The Defendants are indeed blowing hot and cold at the same time. When the Defendants' evidence is weighed against the evidence of the Plaintiff and PW1 which is consistent and straight-forward, it is apparent that indeed the Defendants are not truthful in denying that their representatives impounded the motor vehicle on 07/09/2015 and as alleged by the Plaintiff. I hence find and hold that the Defendants impounded the motor vehicle as alleged by the Plaintiff and PW1.

47. Since the Defendants are legal creations mandated to provide services to the public and in so doing to as well enforce the law, the question which now begs for an answer is whether the Defendants were justified in impounding the motor vehicle. The answer to that question lies in the reasons advanced by the Defendants through Exhibit 2 which I will analyze hereunder.

48. The first reason was that the Plaintiff was engaged in transporting some mineral ore without a valid license in contravention of the then **Mining Act, Cap. 306** of the Laws of Kenya (now repealed and hereinafter referred to as '**the repealed Act**') and in further contravention of some County legislation. The second reason was that the Plaintiff had not paid the requisite royalties to the County Government of Migori for the mineral ore he was transporting, and the third reason was that the Plaintiff was found prospecting and mining within the jurisdiction of the County Government of Migori without paying the requisite royalties.

49. In answer thereto, the Plaintiff contended that the Defendants lacked the jurisdiction to deal with any aspects of mining since that was a function of the National Government under **Article 186(1)** of the **Constitution** as read with the **Fourth Schedule** thereof that was never devolved to the County Governments. That, paragraph 22 of the **Fourth Schedule** to the **Constitution** vests the protection of the environment and natural resources in the National Government whereas **Section 6** of the **repealed Act** vested the proprietorship of all minerals in the National Government in trust of the people of Kenya.

50. The Plaintiff further submitted that **Section 5** of the **repealed Act** empowered the Cabinet Secretary and the Principal Secretary to administer the repealed Act under the guidance of the values and principles enshrined in the **Constitution**. That, **Section 183** of the **repealed Act** mandated the Cabinet Secretary to prescribe the rates and royalties payable to the State and **Section 173** of the **repealed Act** was on the procedure in cases of default. The Plaintiff therefore submitted that there was no law that allowed the Defendants to impound the motor vehicle on account of its dealings in mining activities and as such the act remains illegal and was uncalled for.

51. On its part the Defendants maintained that the Plaintiff could only engage in any dealings in mineral ores upon the grant of a dealer's license under **Section 12(5)** of the **repealed Act** which license the Plaintiff failed to produce on demand.

52. That being the parties' respective positions I will first ascertain who is the custodian of the issues relating to mining in Kenya. The starting point is the **Constitution**. **Article 1** of the **Constitution** vests all sovereign power to the people of Kenya which power can only be exercised in accordance with the **Constitution**. That power is exercised at the national level and county level. **Article 2** of the **Constitution** asserts the supremacy of the **Constitution** in Kenya which **Constitution** binds all persons and all State organs at both levels of government and **Article 3** of the **Constitution** obligates every person to respect, uphold and defend the **Constitution**.

53. With a view to exercise the people's sovereign power at the County level, the **Constitution** in **Article 174** and **Article 175** sets out the objectives of devolution and the principles of devolved government respectively. In **Article 186** the **Constitution** sets out the respective functions and powers between the national and county governments. The said **Article** is tailored 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.”*

54. The **Fourth Schedule** to the **Constitution** sets out the distinct functions between the two levels of governments. Relating to mining, **paragraph 22 of Part 1 of the Fourth Schedule to the Constitution** sets out one of the functions of the national government as follows: -

*“22. Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular –*

*(a) fishing, hunting and gathering;*

*(b) protection of animals and wildlife;*

*(c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and*

*(d) energy*

55. In **paragraph 10 of Part 2 of the Fourth Schedule to the Constitution** one of the functions of the County governments is provided as follows: -

*“10. Implementation of specific national government policies on natural resources and environmental conservation, including –*

*(a) soil and water conservation; and*

*(b) forestry*

56. Therefore, the environmental protection and natural resources management function is what I can describe as a ‘**limited shared function**’. Limited in the sense that the County governments can only implement **specific policies on behalf of the national government**. To that end the county governments only acts as implementation arms of the national government policies, but the main function of managing the environment and natural resources is vested in and rests with the national government.

57. Implementation of policy is usually carried out by way of enacting of legislations, or formulation of rules and/or regulations. With that in mind, Kenyans enacted **Article 186(4)** of the **Constitution** thus ‘*For greater certainty, Parliament may legislate for the Republic on any matter.*’ Speaking for this particular matter, for the County Government of Migori to implement any of the policies which the national government may come up with in managing the environment and natural resources, it must be guided by specific legislation passed by either the Parliament (that is the National Assembly and/or the Senate) or the County Assembly of Migori or by any regulations or rules formulated in accordance with the law.

58. The foregone position is clearly captured in **Article 60** of the **Constitution** which provides as follows: -

*“60. (1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles –*

*(a) equitable access to land;*

*(b) security of land rights;*

*(c) sustainable and productive management of land resources;*

*(d) transparent and costs effective administration of land;*

*(e) elimination of gender discrimination in law, customs and practices related to land and property in land and*

*(g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.”*

*(2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.”*

59. One of the legislations contemplated under **Article 60(2)** of the **Constitution** came into force on 27/05/2016. That is the **Mining Act No. 12 of 2016** (hereinafter referred to as ‘**the Act**’) which repealed the **repealed Act**. Prior to the enactment of **the Act**, the mining sector in Kenya was regulated by the **repealed Act** which was enacted on 01/10/1940 and amended with time. Since under **Article 2(4)** of the **Constitution** any law that is inconsistent with the **Constitution** is void to the extent of that inconsistency and any act or omission in contravention of the **Constitution** is invalid, there was need for transitional provisions during the period within which the various laws were to be brought into conformity with the **Constitution**. That was the essence of **Article 262** and the **Sixth Schedule** to the **Constitution** which provided for the ‘**Transitional and Consequential Provisions.**’

60. **Article 262** of the **Constitution** provides that *'the transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date'*. Under **Article 263** of the **Constitution** the effective date is the date the Constitution was promulgated which was 27/08/2010 pursuant to Legal Notice No. 133/2010.

61. **Paragraph 7** of the **Sixth Schedule** to the **Constitution** had the following to say about the then existing laws: -

*"7 (1) 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 in into conformity with this Constitution.*

*(2) If, with respect to any particular matter-*

*(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and*

*(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.'*

62. Therefore, before the enactment of **the Act**, **the repealed Act** remained in force but subject to the **Constitution** in that the **repealed Act** was to be construed strictly in a manner to bring it into conformity with the **Constitution**. It is therefore imperative to have a further look at the Constitution before we subject the relevant provisions of the **repealed Act** to the facts of this case. Having already looked at *inter alia* **Articles 1, 2 and 3** of the **Constitution** suffice to say that **Article 10** of the **Constitution** lays down the national values and principles of governance to be adhered to by all State organs, State officers, public officers and all persons whenever any of them applies or interprets the **Constitution** or enacts, applies or interprets any law or makes or implements any public policy decisions. The values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness equality, human rights, non- discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.

63. **Chapter Four** of the **Constitution** is on the **Bill of Rights**. It enumerates various rights and fundamental freedoms which according to **Article 19** the rights and fundamental freedoms *belong to each individual and are not granted by the State*. The Bill of Rights is an integral part of the country's democratic state and is the framework for social, economic and cultural policies. And, the purpose of recognizing and protecting the human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. The rights and fundamental freedoms are subject only to the limitations contemplated under **Article 24** of the **Constitution**.

64. Some of the rights and fundamental freedoms relevant to this matter include the equality and freedom from discrimination in any manner (**Article 27**), the realization that every person has inherent dignity and the right to have that dignity respected and protected (**Article 28**), Privacy (**Article 31**) and especially *sub-article (b)* which provides the right not to have one's possessions seized. There is also the protection of the right to own any kind of property and the limitation that Parliament shall not enact any law that permits the State or any person to arbitrarily deprive a person of property or limit or restrict the enjoyment of any right to property and that if one is to be deprived of property then it must be in accordance with the Constitution or written law and strictly subject to prompt and full compensation unless the property was unlawfully acquired (**Article 40**). And, the right to fair administrative action which includes the right for one to be given written reasons for any administrative action that may adversely affect a right or fundamental freedom of a person (**Article 47**). Further, the motor vehicle having been arrested, the Plaintiff was entitled to the rights under **Article 49** and **Article 50** (Fair hearing) of the **Constitution**.

65. There was also **the CGA** which gave further guidance to the County Governments on the way they were to discharge their duties as well. **Section 5** thereof reiterated the constitutional position that county governments were only responsible for the functions assigned to them under the **Constitution** or by an Act of Parliament.

66. The foregone was the platform within which the County Government of Migori and its officers was legally called to operate on in the circumstances of this matter.

67. I will now juxtapose the reasons put forth by the Defendants in impounding the motor vehicle against the foregone legal guidance and the provisions of the **repealed Act**. As to whether the Plaintiff required a license to transport any mineral ore, the **repealed Act** never made any such provision. **Paragraphs 5** of **Part 2** of the **Fourth Schedule** to the **Constitution** provides county transport as one of the functions of a County Government. That means a County Government has a right, upon the passage of the requisite laws, to regulate the use of its roads including imposing of approved charges. Although the Defendants did not produce any evidence of the existence of any such laws, there is evidence vide Exhibit 17 that PW1 paid Cess on 07/09/2015. That payment is admitted by the Defendants.

68. The Defendants having failed to adduce evidence that one requires a license to carry out transport activities within the County, this Court finds and holds that one is only required to pay the approved Cess charges to the County Government of Migori for the use of the roads within Migori County.

69. As to whether the Plaintiff had not paid the requisite royalties to the County Government of Migori for the mineral ore he was transporting, **Section 12** of the **repealed Act** comes to play. The said section provides as follows: -

*"(1)All minerals obtained in the course of prospecting or mining operations shall be liable to such royalties as may be prescribed:*

*(2)Provided that the Commissioner may be permit under his hand exempt from liability to royalties samples of minerals*

*extracted for the purposes of assay or of metallurgical tests.*

*(3) No person shall deal in minerals unless he has been registered as a dealer and has been issued with a mineral dealers licence by the Commissioner.*

*(4) A person who has been issued with a mineral dealers licence shall maintain a proper register of the kind, quantity and quality of minerals dealt in, bought, sold, bartered, exported, cut<sup>5</sup> or polished, the manner by which it was obtained or disposed of: and the dealer shall make the registered available for inspection by the Commissioner or any person authorized by him in writing.*

*(5) A mineral dealers licence issued under this section shall expire on the 31<sup>st</sup> December in the year of issue.*

*(6) The fees for a mineral dealers licence shall be prescribed by the Minister by notice in the Gazette.*

*(6A) Any person who possesses or deals in any mineral without a mineral dealer's licence shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or to both; and the minerals in respect of which the offence was committed shall be forfeited to the Government.*

*(7) For the purposes of this section, "to deal in minerals" includes to buy, sell, barter deposit or receive as a pledge or security, export, cut or polish and minerals which are subject to this Act."*

70. Unless otherwise proved, all payments as royalties are required to be paid to the National Treasury upon legal prescription by the Commissioner for Mines and Geology but not to the County Government of Migori. But was the Plaintiff in possession of the alleged mineral ore in the first instance? According to PW1, the motor vehicle was impounded when he was still waiting to load the mineral ore. That is not disputed by the Defendants. The Plaintiff stated that he was only a transporter but did not state whether he was the owner of the mineral ore he was to transport from Nyatike area in Migori County. Given that the Plaintiff and PW1 were not in possession of the alleged mineral ore one wonders how the Plaintiff (even by assuming that he was the owner of the mineral ore) was expected to have paid the alleged royalties. It is within reason that the amount payable as royalties depends on the amount of the mineral in issue.

71. I therefore find that in the unique circumstances of this case it was premature for the Plaintiff to be called upon, by any one including the national government, to show evidence of royalty payment even before he was possessed of the alleged mineral ore. Further, the Defendants having failed to demonstrate that they were implementing a specific policy of the national government as provided for under the **Constitution**, I find that it was unfair, unreasonable and without any legal justification for the Defendants to demand payment of royalties from the Plaintiff.

72. The third reason put forth by the Defendants for impounding the motor vehicle was that the Plaintiff was found prospecting and mining within the jurisdiction of the County Government of Migori without a valid license. There is no iota of evidence that the Plaintiff or PW1 were found prospecting or mining as alleged. The Plaintiff stated that he only dealt in transport business, a fact which was not rebutted by the Defendants. It seems that the letter dated 29/09/2015 (Exhibit 2) was either recklessly authored or was authored with a view to achieve ulterior motives. Where did the author get the information that the Plaintiff was prospecting and mining in the face of failure to adduce such evidence before Court? In any event, the alleged license could only be issued upon application to the Cabinet Secretary and not to the County Government.

73. I must also look at the penalty under the **repealed Act** in the event one was found prospecting or mining minerals without authority. **Section 6** thereof created the failure aforesaid as a criminal offence and one was liable to a fine of two thousand shillings or to imprisonment for a term not exceeding six months and to the forfeiture of all minerals obtained in the course of such unauthorized prospecting or mining and that if such minerals could not be forfeited, to payment of such sum as the Court assesses as the value of such minerals. The law also classified the offence as a cognizable one. That means anyone who was found prospecting or mining minerals without authority committed a criminal offence. He ought to be arrested and charged accordingly.

74. In this case PW1 stated that as he was waiting to load the motor vehicle with the mineral ore outside the Nyatike Police Station when two of the Defendants' vehicles appeared with two armed police officers and he was asked to drive the motor vehicle to the Defendants' headquarters which he complied. Neither the Plaintiff nor PW1 were charged with any offence related to the allegations put forth. The police also never arrested the Plaintiff or PW1. It appears that the police had been requested to provide security for the County officials during their operation.

75. On the forfeiture, the law provided that it was only the minerals which stood to be forfeited but not the medium of conveyance used. Therefore, even if PW1 was found with the mineral ore in the motor vehicle, **Section 6** of the **repealed Act** provided that it was only the mineral which could be forfeited upon conviction by a court of law. Unless the seizure of the motor vehicle was made on the strength of another law, it remained unlawful.

76. As I come to the end of this issue, I must observe that the way the operation was carried out did not conform to the **Constitution** or the **repealed Act**. The actions of the Defendants and/or their staffs were far below what was expected of them as public officers under the **Constitution**. They acted in total disregard to the **Constitution** or any law and cared not on the resultant effects of their actions. Their actions were hence in clear contravention of *inter alia* the national values and principles of governance under **Article 10** of the **Constitution**.

77. Based on the foregone analysis, I must answer the third issue in favour of the Plaintiff. For clarity, I hereby find and hold that the Defendants impounded the motor vehicle without any lawful justification.

**(d) Whether the impoundment of the motor vehicle affected the contracts:**

78. On the contract between the Plaintiff and the Star Company, there is evidence that the contract was cancelled for failure by the Plaintiff to provide the contracted services. Exhibit 4 is a letter form the Star Company to the Plaintiff on the subject. It is dated 09/10/2015.

79. In respect to the contract between the Plaintiff and the Salt Company, there is no written evidence on the cancellation of the contract. However, having found that there existed a contract towards transporting salt from Gongoni to Jinja using the motor vehicle and given that the motor vehicle was impounded then the contract was definitely terminated. The same position fell the contract between the Plaintiff and the drivers.

80. The Plaintiff testified that he used to offset the loan advanced by the Financier from the proceeds of the transport business and that the impoundment led to him defaulting in the repayment of the loan and the eventual repossession and sale of the motor vehicle and the vehicle number KBK 294C. Exhibits 9 and 10 are to that effect.

81. Further, the Plaintiff testified and proved by way of Exhibits 11(a) and (b) that he was listed at the Credit Reference Bureaus as a defaulter; an act which has caused him untold suffering.

82. The issue is hence answered in the affirmative.

**(e) Whether the Plaintiff is entitled to the prayers sought in the Plaint?**

83. The Plaintiff's suit is premised on the actions of the Defendants which culminated with the Plaintiff breaching the contracts he had with third parties. The suit is hence different from the ones in which a party to a contract sues the other party or parties to the contract for breach. It is a unique suit against the third parties which made the Plaintiff breach its contractual obligations with other parties.

84. It is settled in law that in a case where a party to a contract is in breach, then the general rule is that the other party is only entitled to damages to the extent of what it stood to earn from the contract. (See the Court of Appeal decisions in Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR) and Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR). The position however in this case is different since the claim is not by one party to the contract against the other parties to the contracts but against a third party who made the claimant (the Plaintiff herein) default in his contracts obligations.

85. In the unique nature and circumstances of this case I find that the general rule does not strictly apply. I say so because in the event the Defendants are found liable then they must be punished for their actions further to putting back the Plaintiff into the position he would have been but for their actions. That is the only way the Defendants will see the need to act within their defined legal confines.

86. Having said so, I will now deal with the prayer for special damages to the tune of Kshs. 73,589,992/= being the cumulative loss. The particulars of the damages are in paragraph 17 of the Plaintiff and I will deal with each limb guided by the legal position that special damages must not only be pleaded but be strictly proved.

**(i) Contract with Star Company:**

87. According to the contract (Exhibit 3) the Plaintiff was to transport 5 containers from Naivasha to Mombasa every month at the rate of Kshs. 316,000/= per container. That translated to Kshs. 1,583,000/= monthly. The period of the contract was 2 years from 01/07/2015. The entire contract sum was to be Kshs. 37,992,000/=. Agreeing with the Counsel for the Defendants I find that the contract had run for two months before the motor vehicle was impounded hence the Plaintiff is only entitled to what he would have earned in the remainder of the contract period which is 22 months. That is Kshs. 34,826,000/= which amount I find well pleaded and proved.

**(ii) Contract between the Plaintiff and the Drivers:**

88. The Plaintiff prayed for Kshs. 3,840,000/= being salaries for four drivers at the monthly rate of Kshs. 40,000/= for the two years under the contract with Star Company. Although I found that there were contracts between the Plaintiff and the drivers, there is however no proof that the Plaintiff employed four drivers who each earned Kshs. 40,000/= monthly. The claim is hence unproved.

89. But, even if there was proof of employment and earnings, still I would not have awarded the amount sought for on account of jurisdiction. That claim falls squarely within the realm of Employment and Labour Relations Court.

**(iii) Loss of Business and income:**

90. The Plaintiff prayed for loss of business and income at the rate of Kshs. 250,000/= per day from 07/09/2015 to end of October 2015. The Defendants contended that the period should only be the number of days the motor vehicle was under attachment which was 49 days as opposed to the 53 days pleaded by the Plaintiff.

91. In his testimony the Plaintiff stated that apart from the contract he had with the Star Company he also had another contract with the Salt Company for transportation of salt to Uganda. I also so found. Having found that the contract existed it was incumbent upon the Plaintiff to prove his earnings from that contract. The delivery notes which formed the basis of this Court finding the existence of a contract had nothing to do with the earnings under the contract. The Plaintiff only stated in his testimony that he earned Kshs. 300,000/= on a single trip to Uganda and Kshs. 180,000/= on return. There was however no evidence in support of the earnings.

92. I therefore find that the claim for loss of business and income as pleaded was not proved.

**(iv) Loss of the motor vehicle and vehicle number KBK 294C:**

93. There is no doubt that because of the impoundment of the motor vehicle the Plaintiff defaulted in the loan repayment and the Financier exercised its legal rights over the motor vehicle and the other vehicle which had been used as a collateral. The Plaintiff was hence deprived of the ownership of the two vehicles and claimed Kshs. 13,000,000/= for the motor vehicle and Kshs. 5,500,000/= as the value of the other vehicle.

94. The Defendants submitted that the value of the motor vehicles to be awarded should be the ones proved by the valuation reports since the Plaintiff had instead pleaded higher values. I agree with that submission. The valuation report for the motor vehicle (Exhibit 12a) gave the market value as Kshs. 7,300,000/= and a forced value as Kshs. 6,900,000/=. I will adopt the forced value in this case since the motor vehicle was sold in an auction. Likewise, I will settle for Kshs. 4,500,000/= for the other vehicle which amount is given as the forced value in the valuation report produced as Exhibit 12b.

**Prayer for general damages:**

95. The Plaintiff pleaded for general damages. He testified that the Defendants' actions were totally uncalled for and that he took steps towards amicably settling the matter with the Defendants in vain. That, because of the Defendants' said actions he defaulted in the loan repayments and lost his two motor vehicles. That, he was also listed as a defaulter by the Credit Reference Bureau and that the totality of it all is that he lost all his business and has since remained without any income. That, he is uncreditworthy and cannot even borrow the least amount possible.

96. He further decried the loss of his business integrity which he had built over time and that he could not be trusted any more. That, the net effect of the Defendants' actions rendered him financially unstable.

97. The Plaintiff's status after the events complained of in this suit were not challenged by the Defendants during cross-examination. I watched the Plaintiff testify before me and he appeared a very dejected man. There is no doubt he was hard-hit by the way the events unfolded after the impoundment and detention of the motor vehicle. No doubt his dignity was greatly impugned.

98. As I have already stated above, this is a perfect case for consideration of an award of general damages for the unlawful actions of the officers of the Defendants in the impoundment and detention of the motor vehicle. The Plaintiff prayed for an award of Kshs. 1,000,000/= under this head. I am however persuaded that an award of Kshs. 500,000/= serves as adequate damages and I hereby award the Plaintiff.

**Disposition:**

99. I must say that this matter has greatly wounded devolution within Migori County. Instead, the colossal sums which shall now be paid to the Plaintiff would have gone a very long way in variously attaining the objects of devolution within the County. There was no justification at all in how the Defendants acted the way they freely chose to. This Court was truly surprised at how the Defendants through DW1 attempted to justify what they did. County Governments are body corporates and only act through its officers. I hereby remind those discharging various duties in the County Governments that they are public servants and they must discharge their duties within the **Constitution** and the law.

100. Infact the dictates of the **Constitution** especially under **Articles 10, 73 and 75** coupled with several other laws have the effect of lifting the veil on public officers to the extent of requiring personal responsibility in the manner an officer discharges public duty. It is high time that public officers be held personally responsible for actions they commit or omit way out of any legal justification since such officers end up hiding under the corporate entity thereby loading their institutions with unnecessary liabilities. Aggrieved parties should in addition consider suing such officers in their personal capacities as well. To that end, devolution will be protected and will ultimately realize the intended objectives.

101. Having said so, I now enter judgment for the Plaintiff against the Defendants, jointly and severally, as follows: -

**(a) A declaration is hereby issued that the impoundment and detention of the motor vehicle registration number KCB 262X/ZE 9242 by the Defendants through their officers on the 07/09/2015 was unlawful, null and void.**

**(b) Special Damages at Kshs. 46,226,000/= with interests at court rates from the date of filing of this suit.**

**(c) General Damages at Kshs. 500,000/= with interests at court rates from the date of this judgment.**

**(d) Costs of the suit.**

102. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 12<sup>th</sup> day of April 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Kisia** Counsel instructed by Messrs. Edward Kisia & Associates Advocates for the Plaintiff.

**Mr. Ouma** Counsel instructed by Messrs. Odhiambo Oronga & Company Advocates for the Defendants.

**Ms. Nyauke** - Court Assistant