



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC CON PET NO. 9 OF 2017

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 21, 28, 39, 40, 47, 49,
174 AND SCHEDULE OF THE CONSTITUTION OF KENYA.**

AND

**IN THE MATTER OF MAKUENI COUNTY SAND
CONSERVATION AND UTILISATION ACT 2014.**

AND

**IN THE MATTER OF VIOLATION OF ARTICLES 39,
40 AND 47 OF THE CONSTITUTION OF KENYA.**

BETWEEN

CYRUS KUMU MBURU.....1ST PETITIONER

MARTIN THUO GITAU.....2ND PETITIONER

LAWRENCE MUTUKU MWANGANGI.....3RD PETITIONER

KRANKS ENTERPRISES LTD.....4TH PETITIONER

VERSUS

MAKUENI COUNTY SAND CONSERVATION

AND UTILISATION AUTHORITY.....RESPONDENT

JUDGEMENT

1. By petition dated 17/10/2017, the Petitioners seek the following prayers/orders:-

1) **THAT** a mandatory order of injunction do issue compelling the respondent to immediately release motor vehicle registration Nos. KCL 164R, KCF 873V, KCD 579X and KBZ 288R, to the 1st, 2nd, 3rd and 4th Applicants.

2) **THAT** an order of permanent injunction do issue restraining the Respondent from impounding, towing, detaining, or arresting or causing the arrest of the drivers of the Petitioners; motor vehicles being motor vehicle registration Nos. KBZ 288R, KCF 873V, KCD 579X, KCL 164R, KCG 355W, KCJ 236N, KCA 507Z, KCC 058A, KCC 058A, KCC 619H, KCD 938Z, KCE 285B, KBV 468A, KCC 419H, KCF 512N, KCL 835K and KCK 307G in respect of any allegation of contravention of the above said Makueni County Sand Conservation and Utilization Act 2014.

3) **THAT** a Declaration that the respondent is an unconstitutional body performing unconstitutional functions in contravention of Schedule 4 of the Constitution.

4) **THAT** any other relief that the court may deem fit and just to grant.

5) Costs of the Petition.

PETITIONERS CASE

2. On 05/10/2017 and 25/09/2017, the Petitioners were driving their motor vehicle KCL 164R, KCF 873V, KCD 579W, KBZ 288R after procuring sand from Kajiando County which has licensed thereof to harvest sand.

3. The time the motor vehicles were moving was between 11.00 p.m. and 5.00 a.m.

4. The respondent's officials stopped them at Sultan Hamud along Mombasa – Nairobi road on allegation that they were violating Makueni County Sand Conservation and Utilization Act 2014 which prohibits the transportation of sand outside time set between 6.00 a.m. to 6.00 p.m. The motor vehicles were confiscated and impounded.

5. The Act aforesaid is being applied to prohibit transporting sand via Makueni County even where same is procured elsewhere and licensed to be harvested.

6. The petitioners aver that the respondent have no right to impound their Lorries. Their rights to the properties were being violated thus the instant claim.

RESPONDENT CASE

7. The respondent filed a Replying Affidavit sworn by Jackson Muthaisu on 23/10/2017.

8. It is deponed to that Article 185(2) constitution donates County Assembly power to make laws for its functioning under 4th schedule.

9. The instant Act authorizes regulation and protection of Environment. The Act prohibits vide section 6 harvesting, selling and distribution of sand.

10. Section 30 provides that persons only allowed to extract, harvest scoop, transport sand between 6.00 a.m. to 6.00 p.m. The violation attracts imprisonment of 2 years or fine of Kshs. 200,000/= or both.

11. Thus the petitioners' drivers drove motor vehicles within the prohibited hours 5.00 a.m. and 11.00 p.m. thus impounding of same motor vehicles justified.

12. The respondent avers that this court has no jurisdiction as the dispute lies squarely within the jurisdiction of the ELC.

13. The parties agreed to canvass the petition via submissions but only petitioners filed and served the same.

PETITIONERS SUBMISSIONS

14. The manner of arrest and conduct of the respondent's agents and/or servants violates the provisions of Article 28 of the constitution which provides that every person has inherent dignity and the right to have that dignity respected and protected.

15. The court is urged to rely on the following authority. **Petition No. 463 Of 2015 Titus Barasa Makhamu –Vs- Police Constable Kinuthia Gitau No. 83653 & 3 Others (2016) Eklr** in which it was held that the petitioners rights were violated in so far as he was subjected to physical abuse in the sense of being beaten by a baton whilst already in the custody of the respondent and the petitioner was awarded Kshs. 250,000/= as general damages.

16. It is contended that the Respondent further violated article 49(1)(a)(i) of the constitution which provides that an arrested person has the right to be informed promptly in a language he understands of the reason for the arrest.

17. The Respondent impounded the vehicles of the Petitioners and confiscated their vehicle keys and without informing them the reason for that. It was upon visiting the Respondents' authorities at Wote when they were informed of the reasons for the arrest.

18. They rely on the authority of **Petition No. 240 of 2013 Maurice Justice Adongo –Vs- Attorney General (2014) eKLR** where it was held that the petitioners fundamental rights were violated by the police and/or other agents, servants and employees of the government of Kenya and subsequently the petitioner was awarded Kshs. 4,000,000/= as compensation for the violation of the rights and freedoms.

19. The act of the respondent's agents and/or servants of restraining the 1st, 2nd, 3rd and 4th Petitioners from freely moving to conduct their businesses within the law violate the provisions of Article 39 of the constitution which provides that every person has the right to freedom of movement.

20. Further the constitution provides that every citizen has the right to enter, remain in and reside anywhere in Kenya.

21. The act of the Respondent's agents/ and/or servants of impounding and confiscating the 1st, 2nd, 3rd and 4th petitioners' motor vehicles registration numbers KBZ 288R, KCF 873W, KCD 579X and KCL 164R respectively is in contravention of the provisions of the constitution as it violates Article 40 of the constitution which provides for the protection of right to property.

22. Thus it is submitted that the respondent's actions are in great violation of article 40 of the constitution of Kenya.

23. They rely on **Petition No. 16 of 2015 Marius Wahome Gitonga –Vs- Kenya National Highways Authority (2015) eKLR** where it was held that a truck is a private property secured by article 40 of the constitution and a conservatory order was issued compelling the respondent to release to the petitioner the set of number plates.

24. The respondent's violated Article 47 by carrying out administrative action that was unlawful, unreasonable and procedurally unfair to the petitioners.

ISSUES, ANALYSIS AND DETERMINATION

25. After going through the pleadings and the submissions, I find the issues are:-

i. Whether the court has jurisdiction in the instant matter?

ii. If the above is affirmative, is the respondent's act of impounding petitioners' motor vehicles unconstitutional?

iii. Is the Act applied herein unconstitutional?

iv. What is the order as to costs?

26. 165. (3) of constitution of Kenya Subject to clause (5), the High Court shall have -

(a) **Unlimited original jurisdiction in criminal and civil Matters;**

(b) Jurisdiction to determine the question whether a right or Fundamental freedom in the Bill of Rights has been denied, Violated, infringed or threatened;

(c)

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) The question whether any law is inconsistent with or in Contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii).....

(iv)

(e).....

(4).....

(5) The High Court shall not have jurisdiction in respect of matters—

(a)

(b) Falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7)

27. Article 162. (1) of the constitution the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a)

(b) **The environment and the use and occupation of, and title to, land.**

28. Article 209(5) of the constitution states that;

“The taxation and other revenue raising powers of a county shall not be exercised in a way that prejudices national government economic policies, economic activities across county boundaries or national mobility of goods, services, capital or labour.”

29. Article 185(2) constitution donates County Assembly power to make laws for its functioning under 4th schedule including matter environment.

30. 185. Of the constitution of Kenya,

(1) The legislative authority of a county is vested in, and exercised by, its county assembly.

(2) A county assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

31. Fourth Schedule Rule 10. the county assembly is authorised to engage in;

Implementation of specific national government policies on natural resources and environmental conservation, including -

(a) soil and water conservation; and

(b) forestry.

32. Pursuant to that power the Makueni County assemble enacted **The Makueni County Sand Conservation and Utilization Act 2014** which prohibits transportation of sand between 6pm to 6am within its boundaries.

33. The instant dispute is arising out of the contestation that the mobility of sand as a good of sale via Makueni County between the prohibited time is being subjected to a fine of Kshs. 200,000/= penalty and in default impoundment of M/Vs and arrests of the drivers.

34. Thus the view that subjecting the transportation of sand across the county boundaries to such legislation when same is not sourced from same County is the core issue thus this court has jurisdiction.

35. The court holds that the dispute herein is not on environment, occupation, use or title to land to warrant the dispute to be within the province of the ELC court but the effect of applying the legislation to impound motor vehicles carrying sand passing via county anytime between 6.00 p.m. to 6.00 a.m.

36. Once sand is proved to have been sourced from outside Makueni County, the Makueni County Government and its agencies have no right to impound the vessels (lorries) transporting it nor arrest the drivers thereof or the owners of the said lorries.

37. This will be violating the spirit of the provisions of Article 209 supra and also art 39 which states that;

39. (1) Every person has the right to freedom of movement.

(2) Every person has the right to leave Kenya.

(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.

38. The respondent should employ a mechanism of verifying the source of sands in mobility via the county to establish its source.

39. The court finds that the acts by the respondent in arresting drivers, impounding the petitioners' Lorries and demanding payment of Kshs. 200,000/= as they traverse the Makueni County with sand sourced outside the County violate the right of the movement and art 209 of the constitution as the same prejudices economic activities across county boundaries and/or national mobility of goods.....

40. There was no evidence that the sand which petitioners' stated Lorries were transporting was sourced from within Respondent's County. In the contrary the petitioners annexed documents to prove otherwise.

41. The petitioners have submitted on damages but same was not sought in the reliefs set in the instant petition. The petitioners are at liberty to seek any loss incurred in the normal suit.

42. The court thus makes the following orders;

1. An order of permanent injunction be and is hereby issued restraining the Respondent from impounding, towing, detaining, or arresting or causing the arrest of the drivers of the Petitioners; motor vehicles being motor vehicle registration Nos. KBZ 288R, KCF 873V, KCD 579X, KCL 164R, KCG 355W, KCJ 236N, KCA 507Z, KCC 058A, KCC 058A, KCC 619H, KCD 938Z, KCE 285B, KBV 468A, KCC 419H, KCF 512N, KCL 835K and KCK 307G in respect of any allegation of contravention of the above said Makueni County Sand Conservation and Utilization Act 2014 if sand being transported is proved to have been sourced from outside Makueni county.

2. Parties bear their own costs.

SIGNED, DATED AND DELIVERED THIS 27TH DAY OF JUNE 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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