



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCC NO. 8 OF 2018

MUTETHIA MUNENE THURANIRA.....APPLICANT

-VERSUS-

MAKUENI COUNTY SAND CONSERVATION

& UTILIZATION AUTHORITY..... RESPONDENT

RULING

INTRODUCTION

1. By notice of motion dated 06/07/2018, the Applicant/Plaintiff seek the following orders:-

1) Spent.

2) **That** pending hearing and determination of this application *inter parties*, this Honourable court be pleased to issue a temporary order directing the release, by the Respondent or any other person acting at its behest, of motor vehicle Registration Number **DCD 832U, Isuzu FSR Lorry/Truck**, held by the Respondents at the Malili DC's office compound or such other place as the same may be impounded as well as the Applicant's and/or his staff documents including a Driving License belonging to one **Stanley Muriira Ndegwa** and Invoice and Delivery Books confiscated by the Respondent's officers.

3) **That** pending the hearing and determination of the suit herein, the Honourable Court does issue an order restraining the Respondent or any other person acting at its behest, from impounding, detaining or in any way interfering with the Applicant's use of motor vehicle Registration Number **KCD 832U, Isuzu FSR Lorry/Truck** in connection with the incident herein.

4) **That** the costs of this application be provided.

2. The same is brought under order 40 Rules 1, 2 Order 51 Rule 1 CPR, Section 1A, 1B & 3A CPA. It is supported by the following grounds:-

1) **That** the Applicant herein is the lawful owner of the motor vehicle **KCD 832U** and the same is registered in the joint ownership of himself and National Industrial Credit Bank Limited (NIC Bank) who have financed its purchase through a loan facility.

2) **That** Applicants uses the motor vehicle for his transport business.

3) **That** the Respondent impounding of the motor vehicle on 01/07/2018 and subsequent detention of the same at the Malili DC's Office's compound on dubious allegations of illegal sand harvesting is unlawful and motivated by highhandedness.

4) **That** the Respondent's decision to confiscate documents including Driving License belonging to Stanley Muriira Ndegwa and other documents such as invoice and deliver books that have no connection with the issue in question are also unlawful and meant to harass and intimidate the Applicant.

5) **That** the Respondent has to-date not proffered any prosecution against the Applicant, the motor vehicle's driver or any person connected thereto with any known offence under the Kenyan laws.

6) **That** the Respondent's verbal indication to the Applicant to pay a colossal sum of Kshs. 200,000/= before the release of the motor vehicle without giving an explanation thereto is unlawful and calculated to subject the Applicant to hardship.

3. It is supported by affidavit of Mutethia Munene Thurairara sworn on 06/07/2018 which reiterates the same grounds.

4. The application is opposed by way of a Replying Affidavit sworn by Halinishi Yusuf sworn on 19/07/2018 which in a nut shell state that on 02/07/2018 at 2.30 p.m., Respondent officers received call from chief Kion Location informing them of Motor vehicle KCB 832U was ferrying sand illegally contrary to provisions of Makueni Sand Conservation and Utilization Act and Regulations and arrested by members of the public *inter alia*.

5. The parties agreed to canvass application via oral submissions.

APPLICANT SUBMISSIONS

6. Through Muumbi counsel for the Applicant submitted that the applicant is the owner of motor vehicle subject matter herein which he uses for commercial purposes. It is contended that there is no legal justification for detaining it thus applicant seeks mandatory injunction. The counsel cited the case of **KBL –Vs- Washington Okeyo 2002 KLR**, Page 109 which sets out the parameters of granting mandatory injunction. *See page 948*.

7. It was submitted that the conditions for grant of mandatory injunctions are *inter alia*; where there are special circumstances, in clear cases, where act is simple and summarily, where defendant tries to steal a match. Same has been applied in our jurisdiction. Also see **Locabail Int. F Ltd 1986 Allen Eng. Report 901**.

8. It is urged that same circumstances on grant obtain in the instant matter thus the Applicant has met threshold for grant. This is because the special circumstances obtain herein. The- ownership is not disputed. The motor vehicle is for business.

9. It is submitted that, no law allows Respondent to detain motor vehicle. No reason for detention was given. If it is to be an exhibit same has to be stated. The cited statute does not authorize impounding of the motor vehicle.

10. Nobody is charged with a criminal offence; then for what purpose is motor vehicle is held since 01/07/2018? The Applicant is servicing loan by payment of Kshs. 250,000/= per month. He is likely to lose the motor vehicle if same is not released.

11. There is also violation of right to property under constitution, right to fair trial and fair administrative action. If there is any crime committed let the Respondent institute charges under the law. There has to be a balance of rights.

RESPONDENT SUBMISSIONS

12. Through Hassan counsel for the Respondent relies on Replying Affidavit of Halinishi Yusuf sworn on 19/07/2018 and opposed the appeal. He submitted that Article 185(2) grants county Association powers to enact laws. The issue is the source of the sand.

13. In event court finds motor vehicle is to be released, there should be condition that it should be availed to the court as an exhibit.

ISSUES, ANALYSIS & DETERMINATION

14. After going through the material before the court, the court finds that the only issue is;

- *Whether the threshold of grant of mandatory injunction has been met?*

15. In the case of **Kenya Breweries Ltd –Vs- Washington Okeyo (2002) EA 109** the court had occasion to discuss and consider the principles that govern the grant of mandatory injunctions.

16. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of **Halsbury's Laws of England 4th Edition paragraph 948** that:-

“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 simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

17. In the English case of **Locabail International Finance Ltd –Vs- Agro Export & Another (1986), ALI ER 901** which the Court of Appeal in Kenya has followed with approval in many decisions, the court held that:-

“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 easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

18. In the recent case of **Nation Media Group & 2 others –Vs- John Harun Mwau [2014] eKLR** the Court of Appeal said:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

19. The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear.

20. In an application like the one before court where an Applicant seeks a mandatory interlocutory injunction, the court will act sparingly and only accede to the request and grant such an order in the clearest of cases. See **Kenya Airports Authority –Vs- Paul Njogu Mungai & 2 others) [1997] eKLR**. Megarry J. sounded this caution in the case of **Shepherd Homes Ltd –Vs- Shadahu (1971) 1 Ch 34** as follows:-

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action the court will of course grant such injunction as the justice of the case require; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”

21. What is the Applicant’s case then? That the Respondent impounded of the motor vehicle subject herein on 01/07/2018 and subsequently detained it at the Malili DC’s Office’s compound on allegations of illegal sand harvesting.

22. The Respondent also confiscated documents including Driving License belonging to Stanley Muriira Ndegwa and other documents such as invoice and deliver books that have no connection with the issue in question.

23. To date no action has been taken to charge the owner or his driver or both with the offences related to sand harvesting or transportation within the Respondent county. The Respondent does not controvert the above averment.

24. The motor vehicle is just parked loaded with sand without any indication as to what the Respondent intends to do with the same nor does the Replaying affidavit shed light of the intention of holding the same and the claimed documents.

25. The motor vehicle debt is averred to be attracting a monthly payment of Kshs. 250,000/= which cannot be paid without motor vehicle continuing with transportation business. The Applicant is apprehensive that the financier might reposes the same.

26. Thus the court finds that the threshold for grant of the mandatory injunction has been established and thus makes the following orders;

i. Order be and is hereby issued directing the release, by the Respondent or any other person acting at its behest, of motor vehicle Registration Number KCD 832U, Isuzu FSR Lorry/Truck, held by the Respondents at the Malili DC’s office compound or such other place as the same may be impounded as well as the Applicant’s and/or his staff documents including a Driving License belonging to one Stanley Muriira Ndegwa and Invoice and Delivery Books confiscated by the Respondent’s officers.

ii. The m/v KCD 832U and staff documents including a Driving License belonging to one Stanley Muriira Ndegwa and Invoice and Delivery Books to be availed to this court or any other court in event charges are preferred against Applicant or his agent hereof if so needed.

iii. Costs in the main cause.

SIGNED, DATED AND DELIVERED THIS 24TH DAY OF JULY 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE