REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 533 OF 2017

Disaranio Limited.....Plaintiff/Applicant

Versus

Kenya National Highways Authority.....1st Defendant/Respondent

SGS Kenya Limited.....2nd Defendant/Respondent

RULING

Introduction

1. The application the subject of this ruling has been pending in court since 29th June 2017. The suit was originally filed at the Chief Magistrates Court.[1] The plaint was accompanied by the Notice of Motion now under determination which was certified as urgent on 30th June 2017.

2. On 17th August 2017, the plaintiffs' counsel filed an application seeking to have the case transferred to the High Court Civil Division. On 11th October 2017, Mbogholi J ordered that the lower courts' file be transferred to the High Court and that the file be transferred to the Constitutional and Human Rights Division. An amended plaint was filed on 17 August 2017.

3. The plaintiffs case is that the agents of the defendants using metal spikes damaged three tyres of the plaintiffs motor vehicle KBW 133T, damaged the plaintiffs vehicles windows, and unlawfully impounded the vehicles number plates as a consequence of which the plaintiff has suffered loss as particularized in paragraph **14** of the plaint and prays for damages, an injunction and challenges the constitutionality of Section **106 (4)** and **(4A)** of the Traffic Act.[2]

The application

4. The original plaint was accompanied by the Notice of Motion now under determination seeking orders for the release of the said number plates and an injunction restraining the Respondents from detaining the same. The application is premised on the grounds on the face of the application and the supporting affidavit which I have carefully considered.

5. Among the grounds cited is absence of justifiable cause to detain the number plates, that the plaint has *prima facie* chances of success and unless the orders are grated, the suit will be rendered nugatory.

6. The application is opposed. Derrick Makoyi, an employee of the second Respondent avers that the second Respondent is a contractor /agent of the first Respondent mandated to operate all weighbridges in Kenya on behalf of the first Respondent. He describes the Petitioners' averments as falsehoods and states that he personally saw the Petitioners vehicle which was heavily loaded with ballast. Upon being stopped by the police, the driver accelerated, wilfully defied police order to stop and drove over the spikes. He adds that they were accosted by persons suspected to be employees of Rhino Cement Company and in the confusion the driver fled and the Police officer removed the number plates.

7. Dennis Cheruiyot Higgens, a Roads Inspector in the Axle Load Control Department of the first

Respondent, a body authorized to ensure adherence to the rules and guidelines on axle control, that is to ensure that no motor vehicle is used on Kenya Roads with a load greater than specified by the manufacturer of the chassis of the vehicle as provided under Sections **55** and **56** of the Traffic Act,[3] avers that the first Respondent in conjunction with the Police have authority to remove and confiscate number plates as provided under Section **106 (4)** and **(4A)** of the Traffic Act[4] in the event a motor vehicle is suspected to be overloaded or poses a danger to other road users.

8. He also avers that the officers stopped the vehicle but the driver defied and sped off, diverted onto an access road towards Rhino Cement Company. The officers trailed the vehicle and noted the driver attempting to off load the cargo. The driver disobeyed orders to stop, forcing the officers to put metal spikes along its path to prevent the driver from taking off, but the driver drove over the spikes in an attempt to flee the scene. Pursuant to Section **106 (4) & (4A**) of the Traffic Act,[5] the officers issued a prohibition order and removed the number plates.

9. On record is a further affidavit by Kiarie Kariuki disputing the contents of the above affidavit. In my view, most of the issues raised are matters that can best be determined at the full hearing. More significant is the fact that there is no affidavit by the lorry driver or a person who was at the scene to controvert the account offered in the Respondents affidavits.

10. Also on record is a defence by the second Respondent. As far as it is relevant to this application, the averments are similar to the above affidavit.

Advocates submissions

11. Counsel for the applicant submitted that impounding the number plates without affording the applicant due process is unconstitutional and cited high court decisions rendered in *Chepkoech Maritim vs Kenya National Highways Authority & Another*[6] and *Ricrac Company & Another vs Kenya National Highways Authority & Another*.[7]

12. Counsel for the first Respondent submitted that Section **104 (4)** and **(4A)** of the Traffic Act[8] empowers the Respondents' agents to remove the vehicle identification plates and the vehicle license upon forming the opinion that the it is being used in contravention of Sections **55** or **56** of the Traffics Act,[9]thus the decision was fair and legal.[10]

13. Counsel also submitted that the decision of *Margaret Miano vs Kenya Ntional Highways Authority* [11]relied heavily by the applicants counsel only nullified Regulations **15 (3)** and not Sections **106(4A)** of the Act and distinguished the facts of the said case.

14. The second Respondent did not file submissions to the application.

Relevance of the decisions cited by the applicants counsel

15. I have read the authorities cited by the applicants. They did not deal with the provisions of the law challenged in these proceedings. They can be distinguished from the present case. Clearly, the cited cases have no precedential value to this case.

16. I have in numerous decisions stated that it is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[12]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,* ***[13]****that "Now before discussing the case of Allen vs. Flood****[14]*** *and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts*

proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)

17. The ratio of any decision must be understood in the background of the facts of the particular case.[15] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[16] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[17]

18. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[18] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[19] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[20] My plea is to keep the path of justice clear of obstructions which could impede it.

Principles for granting injunctions

19. At this juncture, it is necessary to briefly examine the legal principles governing applications of this nature. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.

20. In the celebrated case of *Giella vs Cassman Brown and Co. Ltd**[21]*** the Court set out the principles for Interlocutory Injunctions. These principles are:-

i. *The Plaintiff must establish that he has a **prima facie** case with high chances of success;*

ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

iii. If the court is in doubt, it will decide on a balance of convenience.

21. The above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald vs. Canada (Attorney General)**[22]***where the three part test of granting an injunction were established as follows:-

i. *Is there a serious issue to be tried?;*

ii. *Will the applicant suffer irreparable harm if the injunction is not granted?;*

iii. *Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").*

22. The above principles have been cited with approval in numerous cases in Kenya to the extent that they have acquired the singular force of law. In *Mbuthia vs Jimba Credit Corporation Ltd*[23] **Platt JA** echoed the position adopted in the *American Cyanamid* case and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties cases.

23. A *Prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.[24]

24. The plaintiffs seeks an injunction to restrain the Respondent from detaining the number plates. It is not disputed that by confiscating the number plates, the first Respondent acted in conformity with the provisions of Sections **55** and **56** of the Traffic Act[25] read together with Sections **106 (4)** and **(4A)** which provides as follows:-

> ***106 (4)*** *Any police officer, licensing officer or inspector, if he is of the opinion that any vehicle is being used in contravention of section 55 or section 56 or in contravention of any rules relating to the construction, use and equipment of vehicles, may by order prohibit the use of such vehicle, under such conditions and for such purposes as he may consider necessary for the safety of the public or to ensure that such vehicle does comply with the provisions of section 55 or 56; and any such order shall remain in force until the repairs specified therein have been satisfactorily completed and the vehicle has been certified as complying with the rules relating to construction, use, equipment and weight.*
>
> ***(4A)****where a police officer, licensing officer or inspector makes an order under subsection (4) he may remove the vehicle identification plates and the vehicle license and, if he does so, shall deliver them to the Authority to be kept while that order remains in force*

25. The above sections require no elaboration. They empower a police officer to remove the vehicle identification plates. It follows that the police acted in conformity with the law. Realizing the magnitude of this clear legal provisions, the plaintiff amended his plaint to include a prayer seeking to declare the above provisions unconstitutional, which I believe is the reason why this suit was transferred to this court.

26. The question that begs for an answer is, does the plaintiff have a *prima facie* case with a likelihood of success. The answer is no. The action complained of is grounded on the above provisions of the law. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.[26](The court should start by assuming that the Act in question is constitutional).

27. Even if at the end of the trial the court were to be convinced that the provisions in question are unconstitutional, that does not change the legality of the provisions as at the time the actions complained of occurred. In any event, it is an elementary principle of law that an injunction cannot be issued to stop a lawful process or to go against the clear provisions of the law.

28. Further, prayer two of the application seeks an order to return the number plates which amounts to a mandatory injunction. *The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edition, paragraph 948 which reads:-*

> *'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 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 match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.'"*

29. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeyo**[27]*** the Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd vs Agroexport and others**[28]*** where it was stated:-

> *"A mandatory injunction ought not to be granted on an interlocutory application in the absence or 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 interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction."*

30. In *Nation Media Group & 2 others vs John Harun Mwau*[29] 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."*

31. 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 and that the applicant has a good case with a likelihood of success. As stated above, the police action is grounded on clear legal provisions which the applicant seeks to be declared unconstitutional. In short, the facts before me do not satisfy the test for granting the injunction sought.

32. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles[30]and that the applicant must also show he has a right legal or equitable, which requires protection by injunction.[31]

33. The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in *Halsbury's Laws of England*[32] is instructive. It reads:-

> *"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"*

34. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be compensated by way of damages. In the plaint, the plaintiff has sought special and general damages. In fact the special damages have been tabulated. It means that in the event of being successful, the plaintiff can actually be compensated by way of damages. It cannot be said that the plaintiff will suffer irreparable harm, that is, harm that cannot be quantified and compensated.

35. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.[33] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.[34]

36. Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.[35]The court will seek to maintain the *status quo* in determining where the balance of convenience lies. However, as stated above, the applicant has failed to satisfy the first two tests. As matters stand now, the law authorizes the action complained of.

37. An injunction is an equitable remedy, meaning the court hearing the application has discretion in

making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration. Discretion is exercised judicially and on sound legal principles. There is no material before me to influence the courts discretion to grant the application.

38. Applying the above tests, I find and hold that the applicant has not satisfied the tests for granting the injunction sought.

39. Consequently, I find that the application under determination has no merits. Accordingly, I dismiss the application dated **28th** June 2017 with costs to the Respondents.

Dated, Signed, Delivered at Nairobi this **20th** day of **December,** 2017.

John M. Mativo

Judge

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[1] Being CMCC No. **4634** of 2017-Nairobi

[2] Cap 403, Laws of Kenya

[3] Ibid

[4] Ibid

[5] Ibid

[6] {2015}eKLR

[7] {2016}eKLR

[8] Supra

[9] Ibid

[10] Counsel cited R vs Cabinet Secretary for Transport & Infrastructure, Principal Secretary & 5 Others ex parte Kenya Country Bus Owners Association & 8 Others {2014}eKLR

[11] Supra

[12] MANU/SC/0047/1967

[13] {1901} AC 495

[14] {1898} AC 1

[15] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[16] Ibid

[17] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[18] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[19] Ibid

[20] Ibid

[21] {1973}{EA358

[22] {1994} 1 S.C.R. 311

[23] {1988} KLR 1

[24] See Mrao Ltd Vs First American Bank of Kenya and 2 others,{2003} KLR125

[25] Supra

[26] See Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[27] {2002} eKLR

[28] {1986} 1 ALLER 901

[29] {2014} eKLR

[30]See Bosire J in Njenga vs Njenga{1991} KLR 401

[31] See Bosire J in Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another{1990} K.L.R 557

[32]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[33] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[34] Ibid

[35] Supra note 6