



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO 33 OF 2015.

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

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

BETWEEN

JAMES GITHUKU GICHUKI1ST PETITIONER

REUBEN MUTUKU MBALUKA2ND PETITIONER

VERSUS

MAKUENI COUNTY SAND CONSERVATION

AND UTILIZATION AUTHORITY RESPONDENT

RULING

The Application

The 1st Petitioner was the driver of motor vehicle registration number KBX 382 Isuzu Lorry belonging to the 2nd Petitioner, and he claims that on 3rd November 2015 he was accosted by officers of the Respondent who in addition impounded the said lorry which was not loaded, while it was being driven on Mombasa Road towards Sultan Hamud. The Petitioners subsequently filed a Petition dated 9th November 2015 alleging contravention of various of their constitutional rights by the Respondent, and seeking various declarations in this respect, exemplary damages and an order to compel the surrender of the 2nd Respondent's motor vehicle. The Petitioners also filed an application by way of a Notice of Motion dated 12th November 2015, seeking orders compelling the Respondent by themselves, their servants, agents and anyone claiming under them or through them to release motor vehicle registration No. KBX 382 V ISUZU Lorry to them pending hearing and determination of the petition herein. The parties were directed by the Court to canvass the said application by way of affidavit evidence and written submissions.

The Petitioners explained in detail the events leading to the alleged assault of the 1st Petitioner and the impounding of the said motor vehicle in the said Notice of Motion, and in a supporting affidavit sworn by the 2nd Petitioner on 12th November 2015. They further stated that through inquiries they traced the motor vehicle at the Makueni County Sand Conservation and Utilization Authority yard in Wote Town of Makueni town, and were informed that the officers of the Respondent had impounded the lorry on presumption that it was headed to carry illegally harvested sand from an undisclosed river.

The 2nd Petitioner averred that the motor vehicle is still held in the Respondent's yard up to date, and that since it is a commercial vehicle the Petitioners have suffered loss, and he continues to be deprived of his lawful property and the economic benefit derivable from its use. Further, that the 2nd Petitioner acquired the lorry through a bank facility and has suffered loss as he will be forced to service the facility without making profit from its commercial use.

The Petitioner's learned counsel, O.N Makau & Mulei Advocates, filed written submissions dated 24th November 2015, wherein it was urged that the Respondent's act of impounding and confiscating the Petitioners' lorry was in contravention of Article 40 of the Constitution which provides for the protection of the right to property, and reliance was placed on the decision in **Marius Wahome vs Kenya National Highways Authority 2015 e KLR** in this respect.

It was further submitted that Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 vests this Court with jurisdiction to hear an application for interim orders. Lastly, the learned counsel submitted that section 6 of the Makueni County Sand Conservation and Utilisation Act of 2015 does not give powers to the Respondent to make any arrests and/or confiscate private property in enforcement of the Act and its actions were therefore illegal and invalid.

The Response

The Respondents thereupon filed a replying affidavit sworn by Thomas Mboya, an enforcement officer of the Respondent, who stated that the Petitioners have not annexed any document to confirm ownership of the subject motor vehicle KBX 382 V ISUZU lorry as alleged. Further, that the County Government of Makueni has by legislation banned sand harvesting for commercial purposes within Makueni County, and strict measures have been taken by the Respondent to enforce the ban and to protect the environment.

The deponent averred that on 3/11/2015 officers of the Respondent were called by villagers and informed that motor vehicle KBX 382 V ISUZU lorry was being loaded with sand at a place known as Marwa, which is approximately 4.5 km from Mombasa road towards Makueni and near Kima. Further, that the said officers went to the scene to arrest the crew and the said vehicle which was violating the ban, and that the 1st Petitioner and the loaders, upon noticing the officers, fled from the scene and abandoned the said motor vehicle.

It was the Respondent's contention that motor vehicle registration number KBX 382 V ISUZU Lorry was found on the earth road ferrying sand, freshly harvested for commercial purposes, and the deponent denied that physical force was used against the 1st Petitioner as alleged, or that was he ejected from the vehicle, assaulted or robbed by officers of the Respondent. The deponent further denied that the vehicle was being driven along Mombasa Road headed to Sultan Hamud and in the course of business since it was arrested loading sand, and driven to Wote.

It was the Respondent's further contention that the motor vehicle is detained as per the rules and regulation of the County as an exhibit for the pending criminal cases against the 1st Petitioner, and that the Petitioners should bear the consequence of violating the law by depositing the amount demanded by the Respondent before the vehicle is released. Further, that as soon as the amount of penalty of Kshs.171,000 is paid as per the law, the Respondent will release the vehicle to the Petitioners.

Kivuva Omuga & Co Advocates, the learned counsel for the Respondents, filed submissions dated 25th

October 2016 wherein it was argued that the guarantees to property under Article 40 of the Constitution are subject to the limitations set out in Article 24 thereof, and reliance was placed on the decision in **The Seventh Day Adventist Church (East Africa) Limited vs Minister of Education & 3 Others (2014) e KLR** for the position that the rights of the Applicants need to be balanced with the general good of the people of Makueni to protect the environment.

Further, that the Makueni County Sand Conservation and Utilization Act 2015 criminalises sand harvesting and transportation of sand without a permit, and Regulation 9(c) of the Makueni County Sand Conservation and Utilization (Makueni County Sand Conservation and Utilization Authority) Regulations 2015 authorises the apprehension and detention of any vehicle person machines and equipment involved in illegal sand harvesting and transportation. That the Respondent was therefore exercising its statutory obligations in detaining the subject motor vehicle, and that its powers should not be interfered with unless it is clearly demonstrated that its actions were unconstitutional and repressive. Lastly, the Respondent cited various authorities in support of the submission that the Applicants had not met the criteria for the grant of the mandatory injunction he seeks.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issue for determination is whether there are grounds shown for the release of the Applicants' motor vehicle KBX 382 V Isuzu Lorry. In the present case, it is not disputed that the motor vehicle registration number KBX 382 V Isuzu Lorry was detained by the Respondent, and that the said motor vehicle was in the custody and possession of the 1st Applicant at the time of its detention. The 2nd Applicant has deponed under oath that he employed the 1st Applicant as driver of the said vehicle and that he is the owner of the vehicle. The Respondent has disputed the ownership of the said motor vehicle but did not bring any evidence to the contrary.

The Applicants have relied on the guarantee to right to property under Article 40 of the Constitution. The Respondent in its response claimed that the Applicants were involved in commercial sand harvesting which is banned in Makueni County and relied on section 19 -20 of the Makueni County Sand Conservation and Utilization Act 2015, and that the Applicants' motor vehicle was involved in commercial sand harvesting.

However a perusal of the said sections only makes it illegal to harvest and transport sand without a licence. The Respondent further justified the detention of the Applicants' motor vehicle by relying on Regulation 9(c) of the Makueni County Sand Conservation and Utilization (Makueni County Sand Conservation and Utilization Authority) Regulations 2015 which provides as follows:

“The authority may mount road blocks to apprehend persons, vehicles, machines and equipment which are involved in illegal sand harvesting and transporting contrary to the Act and these Regulations”

The Respondent in its response does not specify who, and particularly whether it was the relevant authority that apprehended the said motor vehicle. The deponent in the Respondent's replying affidavit at paragraphs 9-10 stated as follows in this regard:

“9. That I have been informed by officers of our County Government which information I verily belief to be true that on 3.11.2015 they were called by villagers and informed that motor vehicle KBX 382 V Isuzu Lorry was being loaded with sand as a place known as Marwa, which is approximately 4.5. km from Mombasa Road toward Makueni near Kima.

10. That our officers rushed to the scene and laid trap to arrest the crew and the said vehicle which was violating the ban”

In addition the entire content of the Respondent's replying affidavit is based on information from persons who are not identified, and the source of the said knowledge is therefore unknown. Affidavits are used in

Courts to provide the evidence of witnesses, and there are evidentiary, formal and procedural rules which of necessity apply to the presentation of affidavits. The general rule is that the affidavit must contain facts within the deponent's personal knowledge; and there is an exception to this law in interlocutory proceedings where you can have facts in the affidavit that are based on information and belief. Order 19 Rule 3 of the Civil Procedure Rules provides as follows:

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

Considering that the information that was being deposed to was on contentious points, it was required by law of the deponent of the Respondent's replying affidavit to name the source of his information, and it would also have been prudent to obtain affidavit evidence from the sources directly. This Court cannot therefore in the circumstances give any significant weight to the defective replying affidavit filed by the Respondent.

Lastly, the Respondent made detailed submissions on the rules applicable to mandatory injunctions and their inapplicability to the Applicants. The Applicants' application is however brought pursuant to the provisions of the Constitution and not under the provisions applicable to injunctions. Under Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, there is no restriction as to the types of application for interim orders that can be brought in a constitutional petition, and no limits other than those that are provided for in the Constitution can apply.

Article 24 (1) of the Constitution in this regard provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. In addition Article 24(3) provides that the person seeking to justify a particular limitation shall demonstrate to the court that the requirements of Article 24 have been satisfied.

In the present application the Respondent has not shown whether and how the law it relies upon was followed, and has not provided any evidence of the due process it followed in this regard. It is particularly noteworthy in this respect that no documents were produced to show the apprehension of the Applicant's motor vehicle, the demand for any fine due, or of any criminal proceedings instituted against the Applicants.

I am therefore satisfied that the Applicants are entitled to the interim order sought, however subject to certain conditions to prevent the ends of justice being defeated. The Applicants' Notice of Motion dated 12th November 2015 is accordingly allowed, and the Respondent by themselves, their servants, agents and anyone claiming under them or through them are hereby ordered to forthwith release motor vehicle registration No. KBX 382 V ISUZU Lorry to the 2nd Applicant pending hearing and determination of the Petition herein, subject to the following conditions:

- a) The Respondent shall remove any sand if any, in the said motor vehicle in the presence of the Applicants' Advocates and deposit the same at a place of safe custody.
- b) The 2nd Applicant shall not transfer ownership of the said motor vehicle during the pendency of this Petition.

The costs shall follow the cause.

Orders accordingly.

Dated Signed and Delivered at Machakos this 18th day of January 2016

P. NYAMWEYA

JUDGE