



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 54 OF 2015

KABERN ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MAKUENI 1ST DEFENDANT

ADAN MUSAU 2ND DEFENDANT

FRANCIS MUTINDA MAKLI 3RD DEFENDANT

THOMAS MBOYA 4TH DEFENDANT

PATRICK MUSOMBA 5TH DEFENDANT

SIMON MASAI 6TH DEFENDANT

RULING

INTRODUCTION

0. This is a ruling on an interlocutory application pending the hearing and determination of a suit by a Plaintiff dated 2nd November 2015 seeking a mandatory injunction for the release of two motor vehicles detained by the 1st respondent through its officers the 2-6 defendants herein on the allegation of contravention of a County law against sand harvesting in the County for the protection of the environment. The plaintiff alleges that the detention of the vehicles was unlawful as the vehicles were enroute to or from Kajiado County in which it has a licence for harvesting sand. The Defendants have filed a defence denies the allegation and avers that the vehicles were detained while harvesting sand in the 1st Defendant County and were therefore subject to the penalty under the County's legislation for the protection of environment.

THE APPLICATION

0. The specific prayers of the Notice of Motion dated 2nd November 2015 and the grounds thereof are as follows:

“Notice of Motion dated 2nd November, 2015

Orders

1. *That this application be certified as urgent.*
2. *That pending the hearing and final determination of this application, a temporary injunction be issued restraining the defendants, its servants, employees, agents and or nominees from detaining, retaining, impounding or in any other way from dealing with Motor Vehicles Registration numbers KBS 526K Isuzu and KCC 023U Isuzu.*
3. *That pending the hearing and final determination of this suit, a temporary injunction be issued restraining the defendants, their servants, employees, agents and or nominees from detaining, retaining, impounding or in any other way from dealing with Motor Vehicles Registration Numbers KBS 526K Isuzu and KCC 023U Isuzu.*
4. *That pending the hearing and final determination of this application, the defendants, her servants, employees, agents and or nominees be compelled to unconditionally release Motor Vehicle Registration numbers KBS 526K Isuzu and KCC 023U to the plaintiff.*
5. *That pending the hearing and final determination of this suit, the defendants, their servants, employees, agents and or nominees be compelled to unconditionally release Motor vehicle registration numbers KBS 526K Isuzu and KCC 023U Isuzu to the plaintiff.*
6. *That the orders of this honourable court be enforced by the officer commanding Makueni Police Division.*
7. *That cost of this application be provided for.*

Grounds

- a. *The plaintiff/applicant is the registered co-owner of the motor vehicles registration number KBS 526K Isuzu and KCC 023U Isuzu.*
- b. *The motor vehicle KBS 526K Isuzu was unlawfully impounded on 23.10.2015 by the defendants at Kawezee shopping centre while on its way to Kajiado County where it is licenced to buy sand.*
- c. *The motor vehicle KCC 023U Isuzu was unlawfully impounded on 27.10.2015 by the defendants at Kiima road while on its way from Kajiado County where it is licensed to buy sand.*
- d. *The plaintiff has a permit allowing it to buy sand from Kajiado County.*
- e. *The motor vehicle KBS 526K Isuzu was not loaded with sand at the time of detention. It diverted from Ngukomi Sultan road to Kawezee shopping centre to drop some water and then continue with its journey to Kajiado County.*
- f. *Ngukomi Sultan road connect Makueni to Kajiado and being a shorter route, plaintiff has on several occasion used it to access Kajiado County.*
- g. *Kiima is within Makueni County and a shorter route from Kajiado County and the plaintiff has on several occasion used it to access its customers.*
- h. *The plaintiffs will suffer greatly if the said vehicles is not released since the vehicle KCC 023U was loaded with goods on their transportation to the plaintiff's customers.*
- i. *The motor vehicles were purchased through loan from Cooperative Bank of Kenya and Commercial Bank of Africa which may repossess the vehicle if the loan for the month of October is not paid.*
- j. *The transport business is the only source of income the plaintiff has to service its loan to the two banks.*
- k. *Plaintiff has been serving its loan regularly save for this month due to the detention of its vehicles by the defendants.*
- l. *That no lawful explanation has been given to the plaintiff for continued detention of the motor vehicle.*
- m. *No charges have been preferred on any of the plaintiff employees.*
- n. *The defendants have not specified to the plaintiff any by law that has been transgressed by the plaintiff to date.*
- o. *The action of the defendants was illegal, unwarranted and irresponsible and cannot be entertained in a civilized society.*
- p. *No harm will be occasioned by the defendants if the said vehicle is released to the plaintiff.*
- q. *That the defendant has acted contrary to the provisions of Article 40 of the Constitution guaranteeing protection to property.*

- r. *The plaintiffs motor vehicle continues to deteriorate get wasted and devalue as a result of being stored in a pathetic condition by the defendants.*
 - s. *That the defendants will suffer no harm if the said vehicle is released to the plaintiff since the plaintiff is ready and willing to comply with any orders of this honourable court.*
 - t. *This honourable court has jurisdiction to issue the orders sought at the exparte stage in the interest of justice.*
 - u. *That it is in the interest of justice that the said vehicle be released forthwith.”*
0. The Defendant have filed a Defence dated 10th November 2015 denying any unlawful action; asserting their right to take the action on the motor vehicle for breaching the county laws for the protection of the environment and seeking the dismissal of the suit with costs. In a replying affidavit sworn by the 4th defendant on behalf of the other defendants on 10th November 2015, the defendant’s case is set out in paragraphs 9 -26 thereof as follows:

“Replying Affidavit dated 10th November, 2015

- 9. ***That on 23.10.2015, my colleagues and I were called by villagers and informed that motor vehicle KCC 023V was being loaded with sand at a place known as Marwa, which is approximately 4.5km from Mombasa road towards Makueni and near Kima. The said place is not towards Kajiado side and alleged by the plaintiffs.***
- 10. *That we rushed to the scene and laid trap to arrest the crew and the said vehicle which was violating the ban.*
- 11. *That when the crew of the vehicle saw us, the driver avoided arrest and almost hit us and our vehicle in the process.*
- 12. *That we found motor vehicle KCC 023V on the earth road ferrying sand, freshly harvested for commercial purposes along the said road.*
- 13. *That contrary to the allegations of the plaintiff, his driver attempted to avoid arrest, veered of the road but his rear tires ran over the spikes that we had laid as a trap and his tyres were inflated.*
- 14. *That after the vehicle stalled, both the driver and loaders ran away to avoid arrest.*
- 15. *That we remained at the scene guarding the vehicle overnight until the owner came to replace the tires and to collect his vehicle.*
- 16. *That at the time of arrest, the crew of the subject vehicle knew very well that they had violated the law since they ran to avoid arrest.*
- 17. ***That motor vehicle KBS 926K was arrested while loading sand at Kawese, Kalimbini about 3 km off Mombasa road in Makueni County.***
- 18. ***That the crew of the said vehicle also ran away and left the vehicle at the scene after seeing us approaching the vehicle. We thereafter had the vehicle tolled to Wote after the plaintiff failed to pay penalties hereof.***
- 19. ***That it is not true that the vehicle had loaded sand from Kajiado County as alleged by Bernard Karanja in his affidavit sworn on 2.1.2015 in paragraph 6.***
- 20. *That it is clear that Bernard Karanja was not present when the subject vehicles were arrested and cannot depone on what happened during the arrest in view of the witness statement of Boniface Wambui Kioko dated 2.11.2015.*
- 21. *That it is also not true that motor vehicle KBS 526K had been driven to collect water since it was arrested loading sand and tolled to Wote. The driver of the vehicle took off upon seeing the county officers and was not ejected from the vehicle as alleged in paragraphs 3, 4 and 5 of the said affidavit.*
- 22. ***That the sole reason why the vehicles were arrested was because of harvesting and transporting sand for commercial purposes and not what is alleged in paragraph 5 of the said affidavit.***
- 23. ***That the plaintiff should bear the consequences of violating the law by depositing the amount demanded by the county before the vehicles are realized.***
- 24. *That the plaintiff cannot seek the sympathy of his honourable court by alleging repayment of bank loans when it knew well that it has violated the local legislation by harvesting sand for commercial purposes.*
- 25. ***That as soon as the amount penalty of Kshs. 160,000 for each vehicle is paid and plus Kshs. 105,000 for towering charges of motor vehicle KCC 023V, the 1st respondent will release the***

vehicles to the plaintiff.

26. *That the 1st respondent has a right and responsibility to protect the environment and to enforce the ban within the ambit of law.”*

0. Counsel for the parties – Mr. Kinuthia for the plaintiff and Mr. Kiluva for the defendants made oral arguments on 16th November 2015 and ruling was reserved.

ISSUE FOR DETERMINATION

0. The issue for determination in this application is whether the court will, in the circumstances of this case, make an order for mandatory injunction at the interlocutory stage pending hearing and determination of the suit.

DETERMINATION

The principle

0. It is trite law that interlocutory mandatory injunctions may be granted in interlocutory stages but only in clear cases or special circumstances. See ***Alex Wainaina t/a John Commercial Agencies v. Janson Mwangi Wanjihia*** (2015) eKLR (Waki, Nambuye and J. Mohamed, JJA) and ***Lucy Wangui Gachara v. Minudi Okemba Lore*** (2015) eKLR (Mkahandia, Ouko & M’Inoti, JJA) and cases referred to therein. Particularly, the Court in ***Magnate Ventures Limited v. Eng. Kenya Limited*** (2009) KLR 538 set down the principles for the consideration of an interlocutory mandatory injunction as follows:

6. *“A mandatory injunction need not be given at an interlocutory stage. It could be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted. However it would be granted if the case was;*
- a. *clear and one which the court thought it ought to be decided at once, or*
 - b. *if the act done was a simple and summary one which could be easily remedied,*
 - c. *or if the defendant attempted to steal a march on the plaintiff.*
7. *The decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on the discretion of a Judge and each case has to be decided on the basis of its own peculiar facts and circumstances.”*

The circumstances of the case

0. The matter of fact whether or not the plaintiff’s vehicle the subject of this suit were seized within the jurisdiction of the 1st defendant while engaged in unlawful activity of harvesting and loading and transporting sand for commercial activity contrary to provisions of county legislation for the protection of the environment is a matter of fact to be determined upon the hearing of the suit. It is not one that can be determined upon affidavits at this stage. It is therefore not possible at the interlocutory stage to find that the plaintiff has established a clear case that the 1st defendant has no lawful justification to detain the vehicles.

0. However, there is in my view, special circumstances in the case in that the plaintiff’s property may be lost by the continued detention of the suit motor vehicles in which the Defendants have no interest. The defendant’s interest is in the payment of penalty and towing charges for the vehicles upon seizure but the action of continued detention of the motor vehicles may inflict greater damage by loss of the vehicles in the event that payments for mortgage dues on the vehicle are not paid timeously, which payments are made from the proceeds of the Plaintiff’s commercial activity with the vehicles.

0. On the other hand the interest of the defendants in the matter has been set out in the affidavit in reply that –

27. **That as soon as the amount penalty of Kshs. 160,000 for each vehicle is paid and plus Kshs.**

105,000 for towing charges of motor vehicle KCC 023V, the 1st respondent will release the vehicles to the plaintiff.

0. The Plaintiff has shown that it stands the risk of the repossession of the motor vehicles by their financier banks should hire-purchase repayment remain unpaid such repayments being made from the proceeds of the transport business. The balance of convenience which must inform all exercise of discretion lies with the plaintiff which would lose its property by the protracted detention of the motor vehicles as security for the payment of the penalty.
0. It appears to me that the defendants interest in the penalty and towing charges making a total of Ksh.425,000/-, as shown above, may be secured by an appropriate bank guarantee for the payment of the sum upon the final orders after the hearing and determination of the suit.
0. I find that there are special circumstances in this case to warrant an order for mandatory injunction at the interlocutory stage. I also find that the order for injunction should in accordance with Order 40 rule (2) of the Civil Procedure Rules be granted subject to provision of security for the payment of such damages as may be determined by the court upon hearing and determination of the suit. Such damages would take the form of the plaintiff's claim to penalty and towing charges, aforesaid.

ORDERS

0. Accordingly, for the reasons set out above, the Court makes the following orders of the applicant's Notice of Motion dated 2nd November 2015:
 - a. An interlocutory mandatory injunction is issued for the release of the Motor vehicles the subject of the application, registration Nos. KBS 526K and KCC 023U, subject to the deposit with the court within seven (7) days of a Bank Guarantee for the payment of the sums imposed by the 1st Defendant as may eventually be determined to be payable by the Plaintiff to the Defendant upon resolution of the dispute herein.
 - b. Costs in the cause.

DATED AND DELIVERED THIS 8TH DAY OF DECEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kinuthia for the Plaintiff

N/A for the Defendant

Ms. Doreen- Court Assistant.