



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 29 OF 2013

HASS PETROLEUM (K) LTD.....PLAINTIFF

VERSUS

CHRISTOPHER OREMO OBANGE T/A MONAKE

PETROLEUM PRODUCTS.....DEFENDANT

DAVID MACHARIA MURIITHI.....INTERESTED PARTY

R U L I N G

By the amended motion dated 7-11-2013 the plaintiff/applicant prays for an injunction order against the defendant or his servants and agents from dealing with motor vehicle Reg. No. KBS 170B/ZE 0361 together with the fuel thereon pending the hearing and determination of the suit. The application has been supported by the affidavit of one Stephen Okwengu as well as a further supplementary affidavit.

The defendant/respondent has equally filed a replying affidavit sworn on 11-12-2013. The interested party filed his reply too on 14-12-2013. It is instructive to note that the interested party was allowed to come on board after the motion had been filed and this was necessary because he had established that the motor vehicle in issue belonged to him and not the defendant.

The counsels on record each argued strongly their case. The genesis of this application is that on the 16-10-2013 the defendant did purchase fuel from the plaintiff amounting to USD 59,471. The said fuel was to be exported to Congo. The defendant paid in full and all the necessary paper works were done.

On 20-10-2013 the plaintiff received information that the track and the fuel had not crossed the Busia boarder after clearing with the Kenya Revenue Authority.

The appellant raised a complaint and the vehicle was detained on 20-10-2013 at the Busia boarder with another consignment of fuel from Nakuru. The applicant further received a demand notice from KRA to pay a sum of Kshs. 1,151,553/= on the grounds that the fuel declared earlier on did not exit Busia. This prompted the applicant to bring this action.

The defendant on his part has argued that the above allegations are wrong and that in any event the fuel which is being detained did not originate from Kisumu but from Nakuru as admitted by the plaintiff.

The interested party has argued that he is a victim of circumstances. He states that he is not privy to the contract between the plaintiff and the defendant. As far as he is concerned his vehicle is getting wasted on the ground.

I have carefully perused the application as well as the rival affidavits. There is sufficient evidence that indeed the plaintiff contracted the defendant to ferry fuel from Kisumu to Congo. The motor vehicle used is that one that has been claimed by the interested party. It is not equally disputable that the said truck belongs to the interested party.

The question however is whether the fuel left the country through Busia or not. The vehicle was impounded on 20-10-2013 ferrying another consignment from Nakuru. What then happened to the fuel from Kisumu which was destined for export to Congo? If the same exited Busia the defendant should be able to establish so.

As it is now, the defendant is not denying that it was contracted to ferry fuel by the plaintiff on 16-10-2013. I am not able to see any proof that indeed the fuel crossed the boarder.

On the other hand prima facie it appears that the role of the interested party was to simply provide the necessary transport, which it did. Nonetheless, there is need to interrogate what happened to the plaintiff's consignment loaded at Kisumu. Is the interested party aware whether the fuel from Kisumu crossed the boarder before that of Nakuru being loaded?

The principles for granting injunction are well established. It is my finding that there are many questions which need to be answered by the defendant and the interested party. The interested party has not disputed that it was his vehicle that was contracted to ferry fuel from Kisumu en route to Congo.

Did the interested party follow the movement of the truck? By the time the fuel from Nakuru was loaded (although there is no evidence of this) where was the consignment from Kisumu. Is it possible that the Kisumu fuel had already been delivered to Congo before that from Nakuru?

On a balance of probabilities therefore there is sufficient evidence that the application ought to be granted. It would be unfair at this juncture for the applicant to pay KRA without any adequate remedy from the defendant.

For the above reasons I shall make the following orders:

1. **The application dated 4-11-2013 is allowed as prayed.**
2. **The defendant and the interested party alternatively should deposit the sum of Kshs. 1,151,553 with the Deputy Registrar of this court within the next 14 days after which both the motor vehicles KBS 170B/ ZE 0361 and the fuel shall be released to the interested party and the defendant.**
3. **Costs to the plaintiff/applicant.**

Dated, signed and delivered at Kisumu this 19th day of February, 2014.

**H.K.
JUDGE**

CHEMITEI