



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 117 OF 2013

KIVUWATT LIMITED 1ST PLAINTIFF

SMART CARGO LIMITED 2ND PLAINTIFF

VERSUS

THE COMMISSIONER KENYA REVENUE AUTHORITY

CUSTOMS SERVICES DEPARTMENT..... DEFENDANT

CIVICON LIMITED PROPOSED INTERESTED PARTY

RULING

1. The Proposed Interested Party by Notice of Motion dated 25th September 2014 sought the following specific prayers:
 1. *This Motion be and is hereby certified urgent and heard ex parte in the first instance.*
 2. *For the purposes of the hearing and determination of this Motion only, the Applicant be and is hereby joined into these proceedings as an Interested Party.*
 3. *There be a temporary stay of the Court Orders issued on the 24.09.2014 pending the inter partes hearing and determination of the Motion, in so far they decree and direct the Officer Commanding Police Station, Makupa, to enter into and/or forcefully break in and enter into a Transit Shed owned and operated by the Interested Party/Applicant and situated on land privately owned by the Interested Party/Applicant for purposes of supervising the removal of an Equipment known as “Separator” stored therein by the Interested Part/Applicant at the request of the 1st Plaintiff.*
 4. *Upon the inter partes hearing of the Motion, the said Orders be vacated, discharged and/or set aside in their entirety.*
 5. *The Costs of this Motion be provided for.*
2. I have considered the application and the grounds of opposition and replying affidavit respectively for the plaintiff and the defendant and the submissions of the counsel for the parties. The counsel’s submissions in the matter were principally as follows:

Mr. Nyachoti for the Proposed Interested Party:

The order of 24.9.2014, the applicant sought to have been given an opportunity to be heard... Because the applicant has a substantial interest which is fundamentally affected by the order of 24.9.2014. Applicant was not in abundance when the order was made because he was not a party. Rules of Natural Justice required that the applicant be heard... Applicants case is that right to raise administrative action under Article 47 by orders of 24.9.2014... The court did not have jurisdiction to order the release of the equipment and particular to order the Kenya Police to assist in the release of the goods. There was no application for execution before the Judge to warrant the grant of the orders. No auctioneers were instructed in the matter so that the police could be asked to assist. The police can only oversee an execution thus cannot participate as intended by the orders of 24.9.2014.

Mr. Ongoya for the Plaintiff

Kasango, J made a definitive finding that the matter was a physical release in the decision of 24.9.2014. Order of 24.9.2014 vis a vis Article 50 (1) There is no jurisdiction to make that finding in light of Article 165 (b) of the Constitution. Superior Court violated a fundamental right: would not the court be supervising the High Court. Kasango, J's ruling on 18.12.2013 determined the question whether Civicon Ltd had an interest known to law in the subject matter of the proceedings. The court found that they did not have an interest. What is the interest known to law that is different from the interest presented to the Judge Kasango in the ruling of 18.12.2013. Civicon submits that it had custody of separator from 2012. Was it the same question which was decided upon by Kasango, J in ruling of 18.12.2013? The argument cannot be made before this court. It has already been determined by Kasango, J. Lien over subject matter lien: Was it not determined by the court on 18.12.2013. It is a stale argument before the court.

Mr. Mbaye for the defendant

It is KRA that releases the goods that are subject to customs control. Replying affidavits annexure KO3 – Exit note – purpose of release is to ensure that the goods leave the jurisdiction of Kenya. It is in Kenya on transit. KRA's interest is that the separator gets to its destination. The order of 24.9.2014 is clear that “if need be”, the police would avert any form of interference.

3. For the reasons set out below, I have no hesitation in finding that the said application by the proposed interested party cannot be granted.
4. I have considered that the matter of the proposed party's interest in the 'Separator' the subject of the suit has already been decided by the Court (Kasango, J) in the ruling of 18th December 2013. By that ruling the court also dismissed an application for the joinder of the interested party which is the subject of an appeal before the Court of Appeal.
5. The Court also ruled that the defendant Authority and not the Proposed Interested Party had the legal custody of the 'Separator' and this matter is subject of the appeal.
6. By the order of the court made on 24th September 2014, the court (Kasango, J) exercised discretion which this court as court of concurrent jurisdiction cannot supervise in terms of Article 165 (6) of the Constitution.
7. Accordingly, whether or not the proposed Interested Party's submissions that its rights under Article 40 on the right to property, Article 47 on fair administrative action, and Article 50 on the right to fair hearing have been infringed by the High Court by its order of 24th September 2014 have merit, the matter can only be litigated before a higher court as the High Court has no jurisdiction to supervise other superior courts.
8. The application dated the 25th September 2014 is therefore without merit in law and the same is declined with costs to the Plaintiff and the Defendant.
9. The Court has noted the decision of the Court of Appeal at Mombasa in Civil Application No. 37 of 2014 between the same parties wherein the Court, on an appeal from the decision of the High

Court dismissing the proposed Interested Party's application for joinder, in its ruling dated 27th November 2014 has declined to grant a stay of execution pending the hearing of the appeal on the ground that the loss of the 'Separator' would not render the appeal nugatory.

10. For avoidance of doubt, the interim order of stay granted in this suit on the 25th September 2014 is hereby discharged.

Dated signed and delivered on the 27th November 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Ongoya with Mr. Biketi for the Plaintiffs

Mr. Mbaye for the Defendant

Mr. Nyachoti for the Proposed Interested Party