



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 73 OF 2013

SOUTH SHORE INTERNATIONAL LTD PLAINTIFF/APPLICANT

V E R S U S

TALEWA ROAD CONTRACTORS DEFENDANT/RESPONDENT

AND

THE O.C.S CHANGAMWE POLICE STATION INTERESTED PARTY

RULING

1. The Plaintiff alleges in the plaint that the Defendant namely; Talewa Road Contractors Limited ordered and the Plaintiff supplied 462 tonnes of bitumen valued at Kshs. 48,048,000/-. That bitumen was delivered in 21 Bitutainers which the Defendant has continued to detain and which continues to accrue the demurrage charges of USD10 per day after 120 days from the date of delivery. It is the Plaintiff's claim that those 21 Bitutainers continued to be detained by the Defendant.
2. The Plaintiff filed an interlocutory application dated 21st June 2013. The court having heard that application in the absence of the Defendant who had been served but failed to attend court, proceeded to deliver a ruling dated 28th June 2013.
3. By that ruling the court ordered as follows:-

- “ 1. THAT the 21 Bitutainers belonging to the Applicant be kept in the custody of MISA MOGARU AUCTIONEERS pending hearing and determination of this suit.***
- 2. THAT the O.C.S Changamwe to ensure compliance of this orders.***

3. THAT costs in the cause.”

4. The Plaintiff further moved the Court by an application dated 8th July 2013. The Plaintiff sought the following prayers:-

“(a) That the O.C.S Changamwe Police Station be summoned to show cause why he has refused to comply with the orders of this Court issued on 28th June 2013.

(b) That the O.C.S Changamwe be compelled to execute the orders of this Court issued on 28th June 2013 forthwith.

(c) That Honourable Court be pleased to issue break in orders for purposes of assisting the O.C.S Changamwe execute the orders of this Court.

(d) That in the alternative the OCPD Changamwe Police Station be detained in Prison for six months for disobeying the orders of this Honourable Court issued on 28th June 2013.”

5. The Court by its Ruling of 8th July 2013 granted the Plaintiff the order requiring OCS (Officer incharge of Station) Changamwe Police Station to show cause why he refused to comply with the orders of the Court of 28th June 2013.

6. Inspector Francis Omongi appeared in court on 12th June 2013 on behalf of the OCS. In his sworn testimony before Court the Inspector stated that he was instructed by the OCS to execute the Court order dated 28th June 2013. He was instructed by the OCS to take over the execution of that order. On 5th July 2013 while accompanied by five other Police Officers he met with the Auctioneer at the Police Station. He said that the auctioneer was called Simon Muchene. That auctioneer was in the company of another person. They proceeded together to the scene at a yard in Jomvu which was identified by the said auctioneer. At the yard they met Engineer Ogada of Kenya National Highway Authority (KeNHA). The Engineer and the auctioneer talked at length and when the Inspector approached them he realized that there was a dispute. Engineer Ogada said that the yard equipment and the material belonged to KeNHA. Since KeNHA was not a party in the Court order the Inspector said that he consulted the Officer Commanding Police Division (OCPD). He was advised by the OCPD to instruct the party to go to Court and obtain another Court order. Once the Inspector advised the auctioneer, they all left the yard and he did not receive any complaint until the OCS was summoned to show cause before Court.

7. The Plaintiff's counsel in cross examination of the Inspector did not suggest that the Inspector had failed to accompany those that went to execute the order nor did he refute the ownership of the 21 Bitutainers was in dispute and that KeNHA claimed ownership.

8. I see only two issues that present themselves for my consideration-

1. Did the OCS disobey the Court order?

2. What is the role of the Police Officer during execution of Court orders?

9. On the first issue, I would refer to the Court order of 28th June 2013. It stated that the 21 Bitutainers belonged to the Plaintiff be kept in the custody of Misa Mogaro Auctioneers pending hearing and determination of this suit. There is no record of any averment of Misa Mogaro Auctioneers that the OCS or his representative failed to ensure compliance of the order. As a matter of fact the testimony of the Inspector shows that the Auctioneer by the name of Simon Muchene was present at KeNHA's yard when they attempted to execute the order.

10. Simon Muchene is not an auctioneer. In the many affidavits in this matter, it is clear that Simon Muchene is the Managing Director of the Plaintiff's Company. He has clearly deposed to that fact. How

then was the OCS's representative to ensure that the 21 Bitutainers were in the custody of Misa Mugalo auctioneers who did not even accompany him to KeNHA yard?

11. Further the order of 28th June 2013 just required the OCS '*ensures compliance*'. The Order in requiring the OCS to ensure compliance failed to identify where the 21 Bitutainers were situated and failed to indicate any identifiable mark that would ensure that it was the Plaintiff's Bitutainers that were being attached at execution. The Inspector's evidence clearly show that in the light of that failure of clearly identifying the goods at the yard, once he realized there was a dispute he requested the parties to obtain further orders of the Court.

12. In addition the OCS was not party to these proceeding nor a party to the application that resulted in the ruling of 28th June 2013. It would therefore be unjust to grant such drastic orders as sought by Plaintiff when he was not heard.

13. In my view there was no disobedience on the part of the OCS or his representative. I find that the OCS sufficient issued cause why the order of 28th June 2013 could not be executed. There is no evidence before court that the OCS refused to comply with the Court orders.

14. On the second issue on what should be the role of Police Officer during execution of Court orders, I will be guided by the National Police Service Act No. 11A of 2011. Section 24 of that Act sets out the functions of the Police. Those functions mainly deal with the maintenance of law and order. The police mandate under that section is to maintain law and order, preservation of peace, protection of life and property and investigation of crime amongst others. Those functions do not include execution of orders in Civil Cases. It is further clear that the order of 28th June 2013 did not require the police to execute it. What it required is for the police to ensure compliance. There can be many interpretations on what the term compliance means. In my view and bearing in mind the functions of the police, compliance required the OCS to ensure during execution of the order that law and order was maintained. It did not require the OCS to carry out the actual execution of the order. I am guided by the case of **Kamau Mucuha -Vs- The Ripples Ltd CA No. 186 of 1992**. In that case the Court of Appeal had occasion to consider the role of Police in Civil matters. The Court stated-

“Paragraph 4 of the formal order extracted on 22nd September 1992 says that police assistance may be enlisted to ensure that the Plaintiff (i.e the Respondent) is reinstated in the premises. It would be unlawful to utilize the police in a Civil action for the purpose of effecting or aiding private evictions or reinstatements.”

Baring that in mind, I respond to the second issue by stating that Police Officer's role in execution of Civil orders ought to be inkeeping with their functions which relate mainly to the maintenance of law and order. To do otherwise would open the door to the police getting entangled in the Civil action and possibly being sued for wrong doing.

15. In the end I find that the OCS Changamwe Police Station did not fail nor refuse to execute the order of 28th June 2013. The application dated 8th July 2012 is dismissed with no order as to costs.

Dated and delivered at Mombasa this 12th day of August, 2013.

MARY KASANGO

JUDGE