



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)

Civil Case 178 of 2008

MARU PLING AND GEOTECHNICAL CONTRACTORS LTD.PLAINTIFF

VERSUS

MUGANDA WASULWA *t/a* KEYSIAN AUCTIONEERS1ST RESPONDENT

INNOCENT MOMANYI 2ND RESPONDENT

R U L I N G

There are several applications scheduled for hearing today. Mr. Mwenesi seeks to set aside mandatory injunction issued on 27/8/2008 and ruling giving the rise to the mandatory injunction be reviewed and set aside. Grounds are set out thereon

The application is supported by affidavit of Muganda Wasulwa. Secondly, Advocate James Gitau Singh has filed chamber summons dated 31/10/08 seeking that Francis Mugo and Joseph Kimani Mugo be joined in the suit and that order dated 27/8/2008 be set aside. Grounds are set out and application is supported by affidavit of Joseph Kimani Mugo.

Thirdly, there is notice of Preliminary Objection filed by Lumumba, Muma & Kaluma with (a) (b) (c) (d) points of law particularly, there is contempt of court application that 1st defendant should not be heard and that application does not fall under **Order 44 Civil Procedure Code**.

Fourthly, there is notice of motion dated 17/11/08 seeking orders that first respondent be summoned to appear before court to show cause why he should not be committed for contempt of court orders issued on 27/8/2008 and other orders sought therein.

Let it be noted that the applicant's application dated 5/11/08 filed by Mr. Mwenesi seeks the review of order of 27/8/08 and ruling giving rise to mandatory injunction be set aside with costs on the grounds set out on the application. Also that the mandatory injunction given following an inter partes hearing but was not extracted and issued in accordance with **Order 20 Rule 6 and 7 of Civil Procedure Code** and also the court relied on misrepresented facts and granted mandatory injunction and that there was non disclosure of material facts by plaintiff/applicant and second respondent.

The supporting affidavit was sworn by Muganda Wasulwa, the first defendant and applicant in this matter. He swore an affidavit with 29 paragraphs. I have perused annexures and authorities and I have considered them. I have also considered the notice of Preliminary Objection filed by 2nd defendant alleging that 1st defendant is in contempt and he should not be given audience until the alleged contempt

is purged.

Notice of motion dated 17/11/08 seeks order that 1st respondent be committed to prison for contempt and licence of 1st defendant be revoked and that police be ordered to assist. There are replying affidavits. The court wishes to point out that the court has inherent powers to act in order to preserve the cause of justice, **Section 3 A Cap.21**.

A court can issue a mandatory injunction in appropriate circumstances. Upon perusal of this application and the submissions of the several parties. It is clear that there were several interests of various parties. For instance, the issue of calling the Commissioner of Police and Provincial Police Officers are not powers exercised by civil courts.

This court is of the view that the application seeking orders to vary or set aside of the orders made on 27/8/08 ought to be granted and I do hereby set the same aside. Further notice of motion No.17/11/08 is also dismissed as having no merit. The powers of court **Section 80 Order 44** grant powers in certain circumstances.

The order is wide and is open to any person considering themselves aggrieved may apply for review. The court has unfettered jurisdiction to review. There is also the issue that there is contempt of court. It is submitted that there is no contempt because of law. Furthermore the extracting of the order was not complied with. Mr. Gitau associates himself with Mwenesi submissions.

Orders 1 and 2 were obtained on 3/11/08. The court has unfettered jurisdiction. Mr. Gitau submitted that rule of law states that all parties have to be heard. The vehicles were sold. The goods were sold in overt market. Court auctioneer announced the sale was complete at the fall of the hammer. Log books are only prima facie evidence of ownership.

Attachment of vehicles shall be lifted and vehicles shall be released. In conclusion for application dated 5/11/08 the review of decree is allowed and the orders are granted as prayed with costs to the applicants. The application dated 3/11/08 is allowed with no order as to costs. Notice of motion is dismissed with costs.

Orders are made accordingly.

DATED and DELIVERED at Nairobi this 26th day of May 2009

JOYCE N. KHAMINWA

JUDGE