



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 113 OF 2017

GREEN PLAN KENYA LTD.....PLAINTIFF

=VERSUS=

THE GOVERNMENT OF MAKUENI COUNTY.....DEFENDANT

JUDGEMENT

1. By its plaint dated 23rd September, 2014 and filed in court on even date, the Plaintiff prays for judgement against the Defendant for: -

(a) A declaration that the defendant is bound by the County Finance Bill 2013.

(b) A declaration that the prevention of the plaintiff from harvesting, transporting, supplying sand to the China Road and Bridge Corporation is unlawful.

(c) An order of injunction barring the defendant's servants and/or agents from interfering with the plaintiff's equipment and or the plaintiff's project of harvesting and transporting sand from the designated sand dams namely Malaika, Kwa Kaunda, Matinga & Kwa Nthii Sand dams.

(d) Damages at the rate of Kshs.185,000/= per day from 20/9/2014 until the projects resumes as well as exemplary damages.

(e) Costs of this suit and interest.

2. The Plaintiff has pleaded in paragraphs 3, 4, 5, 6, 7, 8 and 9 of its plaint that at all material times it had been contracted to supply sand to China Road & Bridge Corporation (Kenya) for the construction of the Standard Gauge Railway line which passes through Makueni County, that it entered into the relevant agreements with the communities who are custodians of sand dams being Malaika Sand Dam Self Help Group and Darajani Seed Bank Self Help Group for the supply of sand from their various dam sites, that the Plaintiff proceeded to obtain the relevant consent from the National Environment and Management Authority to proceed with the project at the identified sites, that on or about 20th September, 2014 when the Plaintiff's servants and/or agents were engaged in sand harvesting at Matinga sand dam, persons from the Defendant disturbed their work, assaulted some of the Plaintiff's workers while demanding that the sand harvesting should stop immediately, that as a result of the Defendant's actions, the Plaintiff has been denied the opportunity to honour its part of the contract with China Road & Bridge Corporation and continues to pay for hired equipment on a daily basis without working, has suffered and continues to suffer loss and damage, that the Defendant through its agents has threatened to confiscate the Plaintiff's equipment and machinery on the site and that the Defendant's actions are unlawful and illegal, are only intended to frustrate and disenfranchise not only the Plaintiff but also the communities who are the custodians of the sand banks and who have been denied income they so much need.

3. The Plaintiff's claim is denied by the Defendant vide it's amended defence dated 14th November, 2018 and filed in court on the 19th November, 2018.

4. The Defendant has pleaded in paragraphs 3, 4, 5 and 7 of it's defence that the Plaintiff does not hold any valid licence from the National Environment and Management Authority to undertake the alleged project for harvesting of sand within Makueni County, that if a licence in favour of the Plaintiff was issued, which the Defendant expressly denies, then the licence was issued irregularly and unlawfully and did not comply with the terms and conditions set out under the Environment Management and Coordination Act, and no consent or authority has been issued, under the Act, that without prejudice the Plaintiff has no authority to harvest sand within Makueni County and the Plaintiff has no cause of action against the Defendant who is merely *protecting the County resources from encroachment and misappropriation by unscrupulous individual citizens and companies* (italics are mine) for the benefit of the citizens and companies and that the Plaintiff has not obtained the necessary approval from the Defendant to carry out sand harvesting with her jurisdiction.

5. The Plaintiff called Agnes Mutindi Ndeti (PW1) as its sole witness. Ndeti (PW1) adopted the statement that she recorded on 31/08/18 and filed in court on 07/09/18 as her evidence. She proceeded to produce the documents listed in the bundle of documents dated 23/09/19 as P.Exhibit No.1 to 6 respectively. The witness further produced three documents listed in the supplementary list of documents dated 09/08/18

and filed in court on 07/09/18 as P.Exhibit Nos.8, 9 and 10 respectively.

6. Briefly, her evidence was that she was one of the directors of the Plaintiff when it was contracted by China Road & Bridge Corporation to supply sand. That the sand was to be excavated from dams owned by communities and that the Plaintiff entered into agreements with Kathekani Sand Bank Self Help Group and Malaika Sand Dam Self Help Group who are the owners of the sand dams known as Malaika Sand Dam and Kwa Kaunda Sand along Kambu, Kwa Nthii Farm along Ngomeni stream and Matinga Sand Dam. That the National Environment and Management Authority approved the Plaintiff's plan to harvest sand. That on 20/09/14, she received information from the Managing Director of the Plaintiff, one Maluki Musembi, that officers by the names of Cosmas Kamuya and Michael Muthembwa from the office of Makeni County Government visited the site where the Plaintiff's employees were harvesting sand and assaulted one of the drivers, confiscated the keys to the vehicle he was driving and demanded cessation of sand harvesting. She said that there was no formal communication or notice of any kind or any letter that had been served upon the Plaintiff. That as a result of the actions by the Defendant's agents, the Plaintiff has been losing Kshs.185,000/= on daily basis on account of the equipment that is lying idle at the dam site.

7. In her evidence in cross-examination, Ndetei (PW 1) admitted that she was no longer a director of the Plaintiff at the time when she recorded her statement. She added that she currently holds no position in the company. That the two directors who are both in the USA did not give any authority in writing for her to appear in court. She said that in the year 2014, she authorized her son to sign the contract with China Road & Bridge Corporation and that the Plaintiff no longer has a contract with the latter. On being referred to clause 3 of the contract (P.Exhibit No.3), Ndetei (PW1) stated that the agreement was to be terminated on breach of the same. She went on to say that clause 6 of the agreement required the Plaintiff to get approval from the local government authority. That the Plaintiff did not have any approval from the County Government of Makeni for the reason that the latter referred the Plaintiff to NEMA for the necessary approvals. She went on to say that she was not aware of Executive Order number 11013 of 26/04/13 issued by the Governor of Makeni County by the time the Plaintiff and China Road & Bridge Co-operation entered into the agreement. She changed her mind and said that she was aware of the Executive Order but there was no gazette notice. That the Plaintiff continued to harvest sand on the authority it had received from NEMA. She said that she was not aware that they required authorization from the County Government over community land. She admitted that she did not have agreements that the Plaintiff entered into for hiring other equipment. She further admitted that they had not produced evidence of the loss of Kshs.185,000/=.

8. Ndetei's (PW1) evidence in re-examination was that they had the necessary approvals from NEMA and the community.

9. The Defendant called No.1997004810 Senior Sergeant Michael Mutungi Muthembwa (DW1) as it's sole witness. Like Ndetei (PW1), Muthembwa (DW1) adopted his statement dated 14/11/18 as his evidence.

10. His evidence was that he is an Enforcement Officer working for the County Government of Makeni. That on 24/09/14 he and fellow enforcement officers came across motor vehicles that were harvesting sand from Malaika Sand Dam. That when they went to enquire, one Maluki Musembi who was in the company of what witness referred to as goons told the enforcement officers that they were building government railway and that County Laws do not apply to them. That even though Maluki claimed to have paid requisite fees to the County Government, he did not produce any receipts. He said that there was an Executive Order banning sand harvesting within Makeni. That the enforcement officers did not assault any of the drivers.

11. Muthembwa's (DW1) evidence in cross-examination was that he and his colleagues did not have the executive order with them when they executed their duty. He said that he does not know if the order was ever gazetted.

12. In his written submissions, the Plaintiff's Counsel urged the court to find that the Plaintiff's sand harvesting activities were lawful. It was also the Counsel's submissions that the Fourth Schedule of the Constitution has provided the functions that are the preserve of the National Government and those are devolved to the County Governments. In regard, the Counsel cited **Section 22 of Part 1 of the Fourth Schedule of the Constitution** that provides as follows:-

“Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular –

(a) Fishing, hunting and gathering;

(b) Protection of animals and wildlife;

(c) Water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and

(d) Energy policy.”

He went on to cite **Section 10 of Part 2 of the Fourth Schedule of the Constitution** which provides:-

“Implementation of specific national government policies on natural resources and environmental conservation including-

(a) Soil and water conservation; and

(b) Forestry.”

13. Arising from the above, the Counsel was of the view that the Defendant does not have the capacity whatsoever by dint of the Constitutional delineation of functions between the National and County Governments to issue any directive of whatever nature regarding

natural resources and the environment unless and only if the same is done in consultation and towards implementation of a government policy or in exercise of any powers conferred by any specific national legislation.

14. As for damages, the Plaintiffs' Counsel urged the court to find that the Plaintiff lost Kshs.185,000/= per day from 20/10/14 up to the date of filing the suit. The Counsel relies on the case of *Ntukiso Ole Letira vs. Ruth Ngonyo Kangethe [2018] eKLR*;

15. On the other hand, the Defendant's Counsel framed the issues for determination as follows:-

1) Whether Agnes Mutindi Ndetei has locus standi and/or has authority to plead on behalf of the Plaintiff.

2) Whether the Defendant is bound by the County Finance Bill 2013.

3) Whether the Plaintiff is entitled to the reliefs sought.

16. Regarding the first issue, the Counsel cited **Section 3(1) of the Companies Act No.17 of 2015** which defines a company as:-

“company” means a company formed and registered under this Act or an existing company;

It also defines a “director” as:-

“director”, in relation to a body corporate, includes_

(a) Any person occupying the position of a director of the body (by whatever name the person is called), and

(b) Any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act;

Arising from the above, the Counsel submitted that Ndetei (PW 1) in her evidence in cross-examination told the court that she ceased being a director. The Counsel pointed out that Ndetei (PW1) filed her witness statement dated 31/08/18 on 07/09/18 long after she had ceased being a director. The Counsel cited **Section 255 of the Companies Act** which provides as follows:-

“(1) A resolution of members or of a class of members of a private company may be passed either –

(a) as a written resolution; or

(b) at a meeting of the members.

(2) A resolution of the members or of a class of members of a public company may be passed only at a meeting of the members.”

The Counsel urged the court to dismiss the evidence tendered by Ndetei (PW1) as the same falls short of the mandatory provisions of the Companies Act and the Civil Procedure Act Rules 2010 as no authority to act or plead was ever adduced as evidence. The Counsel cited the case of *East Africa Portland Cement Ltd vs. Capital Markets Authority & 4 others [2014] eKLR* where Lady Justice Mumbi Ngugi held thus:-

“with regard to the contention by Counsel for the petitioner that the issues raised by the respondents are mere technicalities which the Court should not take heed of in accordance with Article 159, I must respectfully disagree. Article 159(2)(d) makes reference to “procedural technicalities”. I agree with Counsel for the 2nd Respondent that the issues before me go to the very root of the matter. This is a petition allegedly filed by the East African Portland Cement Company Limited, a limited liability company whose operations are regulated by its Articles of Association and the provisions of the Companies Act. For any action or proceedings to be taken in its name, such action or proceedings must be authorized in accordance with the Articles of Association. It is not a “procedural technicality” to require that a company authorizes any proceedings brought in its name.”

17. And on the second issue, the Defendant's Counsel submitted that it is trite law that for a Bill to have legal effect, the same must pass through the legislative process, get assented to and also get published in the County or Kenya Gazette. That the County Finance Bill 2013 which the Plaintiff relies on has no legal effect.

18. Regarding the third issue, the Counsel submitted that the Plaintiff is not entitled to the reliefs sought and urged the court to dismiss the entire suit with costs to the Defendant.

19. Having read the evidence on record and the submissions filed by the Counsel on record, it is clear that Ndetei (PW 1) is neither a director of the Plaintiff nor does she hold any position in the said company. She admitted that she did not have any authority from any resolution of the directors to enable her testify on behalf of the Plaintiff. Even though Ndetei (PW 1) was previously a director of the Plaintiff company, she cannot purport to act on behalf of the Plaintiff in the absence of a resolution by the directors as is required under Section 255 of the Companies Act No.17 of 2015. As such, her evidence is of no probative value. Secondly, Ndetei (PW1) admitted in her evidence in cross-examination that the Plaintiff did not seek approvals from the County Government of Makueni nor did it pay the appropriate fees to enable it harvest sand within Makueni County and more particularly from the aforementioned Malaika, Kwa Kaunda, Matinga and Kwa Nthii Sand

dams. Having failed to do so, the Plaintiff cannot turn around and accuse the Defendant for ensuring that no sand was harvested within its jurisdiction. As was correctly submitted by the Defendant's Counsel, the County Finance Bill 2013 that the Plaintiff seeks to rely on cannot come to its aid as it remains a "Bill" until it is passed by the County Assembly and assented to by the Executive.

20. Thirdly, even though the Plaintiff claims to have lost Kshs.185,000/= per day being the expenses incurred for hiring of the machinery for harvesting sand, it had no evidence on how it arrived at the said sum of Kshs.185,000/=. It is trite law that special damages must not only be pleaded but must also be proved. The Plaintiff appears to be the author of the misfortune it finds itself in and it cannot blame the Defendant for the termination of the contract or agreement it had with China Road & Bridge Corporation for the supply of sand. In my judgement, I hold that the Plaintiff is not entitled to any damages.

21. The upshot of the foregoing is that the Plaintiff has not satisfied this court on a balance of probabilities that it has a cause of action against the Defendant. In the circumstances, I dismiss its suit against the Defendant with costs to the latter. It is so ordered.

Signed, Dated and Delivered at Makueni this 2nd day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

No appearance for the Plaintiff

No appearance for the Defendant

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

02/10/2019.