



Willmon Freight Ltd & another v Kenya Ports Authority (Commercial Case E71 of 2022) [2023] KEHC 1688 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E71 OF 2022
DKN MAGARE, J
MARCH 9, 2023**

BETWEEN

WILLMON FREIGHT LTD 1ST PLAINTIFF

SAMUEL NJAU MUTHEMBA 2ND PLAINTIFF

AND

KENYA PORTS AUTHORITY DEFENDANT

RULING

1. This matter came before me for an Application dated 23/9/2022. The Application seeks release of motor vehicle registration number KCH 041 A/ZF 4571.
2. These two vehicles are held by the Defendant allegedly for hitting and destroying part of a wall which, in their Defence they indicate to be valued about USD 6,500/=, at today's exchange Rate of 128.55 to a dollar, this amounts to Ksh 835,575/=. If this is true, this is a measly amount that can easily be claimed before the lowest court in the land, including the small claims court.
3. By a letter dated 21.10.2020, the police released the said vehicle over a traffic accident on the same day. The Defendant claim that the insurers have not paid them. It is not the business of the person affected by a tort to hold the tortfeasor's car. For two years, the plaintiff's motor vehicle has been held without any lawful cause. The excuse give is neither plausible nor tenable.
4. Consequently, I note that this is a proper case for issuance of a mandatory order. Before I issue the same, there is a need for a proper understanding of what constitutes a mandatory order and when is it issued.



5. In the case of *Kenya breweries ltd & another vs washington o. Okeya* [2002] eKLR, the court of appeal stated as follows on mandatory injunctions.

“A mandatory injunction ought not to be granted on an interlocutory Application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

6. In *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] eKLR, the court of appeal stated: -

“As this Court stated in *Kenya Breweries Limited & another vs. Washington O. Okeyo* [2002] eKLR a mandatory injunction can be granted on an interlocutory Application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory Application.”

7. In *Shariff Abdi Hassan vs. Nadhif Jama Adan* [2006] eKLR that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

8. A mandatory injunction should only be granted in special circumstances and in clearest of cases. They cannot be issued in cases where the matters are complex and require a full hearing to solve such an imbroglio. The court cannot issue mandatory orders, where the Defendant has a lawful claim over a subject matter.
9. In this case the plaintiff has shown a prima facie case capable of success. Not only that but they have also shown that the Defendant has no legitimate claim over the motor vehicle. I have perused the Defence and the issues raised relate to the destroyed fence, and not the vehicle.
10. The Defendant is a public authority and the monies ultimately payable to the plaintiff were they to succeed and as the case stands they already have a prima facie case capable of succeeding, there will a drain on public resources simply because someone has a hangover over police powers of the time yonder.
11. The question I ask myself, is if I tell these facts to the people sitting outside the mosque in Mwembe Tiyari, will they have a reason to believe that the Defendant ought to remain with this vehicle. In other words, does the destruction of a wall, whether negligent or deliberate or even criminal give the Respondent’s authority to countermand a police order to release the motor vehicle, trailer and cargo.
12. The Defendant are not saying that they are bailees or that there is a claim over the vehicle or trailer. This is meant to show non-existent power. Once the police ordered release of the vehicle then it ought to be released.



13. In the case of *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, the court of appeal said:

“It is trite law that for an interlocutory mandatory injunction to issue, an Applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

14. The above cited cases lay down the principles of law to be considered in an Application for mandatory injunction and the condition that is predominant is that the Applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction.

15. In this case, the Defendant was allegedly wronged by having a wall hit by motor vehicle. They have no claim over the motor vehicle. They have a claim over the money for repair of the wall. The vehicle is not necessary for the repair. Even if the vehicle is kept it cannot repair the wall.

16. The balance of convenience is in favour of issuing the order. The Defendant’s claim will lie in damages in a suit filed either in the small claims court or the lower court for a measly USD 6,500/=. The Defendant has no interest in the plaintiff’s insurer. They can decide not to pay and there is absolutely nothing both parties can do.

17. Indeed, damages cannot be adequate remedy for the vehicle. The losses that go beyond the retention of the vehicle may be found to be too remote to be awarded when in reality they may never be qualified.

18. It must be remembered that we are not dealing with the normal cases. It is nature of the orders sought that determine the cause of a case. In *Kenya Power & Lighting Co. Ltd v Samwel Mandere Ogeto* [2017] eKLR, the court, Hon. W. A. Okwany, held as doth

20. A mandatory injunction is different from a prohibitory injunction in the sense that while in a prohibitory injunction the applicant must, as was stated in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favor, an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.

19. The last aspect is the public interest in the matter. It is not in public interest to be paying for unlawful actions which can be remedied. Public interest demands that the Defendant mitigate on costs. Even when the Defendant does not know that the continued holding of the said motor vehicle is anathema to democracy, good order and effective, efficient and economic use of resources required under article 232 of *the constitution*.

20. This case has shown special circumstances, where the defendant is holding the motor vehicle to blackmail the plaintiffs to settle a road traffic accident instead of filing suit for recovery. Further, being a heavy commercial vehicle, losses incurred cannot be fathomed. They will soon outstrip the value of the vehicle and will drain public resources.



21. This Application is to save the Defendant from their own miasma and state of unbridled confusion as to the place of respect of private property.
22. In the circumstance I allow the Application.

Determination

23. I make the following orders: -
 - a. Motor vehicle registration number KCH 041 A/ZF 4571 be released forthwith, unconditionally and without payment of any storage charges or other charges, to the custody of the Plaintiffs, Willmon Freight Ltd & Samuel Njau Muthemba or their agents as identified by the Plaintiff's advocates M/S Ondieki, A. Hashi and Company Advocates.
 - b. The Officer Commanding Station, Port Police Station and County Commander of Kenya Police Service, Mombasa County do give assistant to the Plaintiffs in enforcing this order forthwith.
 - c. A report of enforcement be field in court in the next 7 days.

DATED, ISSUED AND DELIVERED AT MOMBASA VIRTUALLY 9TH MARCH THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of;

Miss Yunus for the Plaintiffs/Applicants

No appearance for the Appellant

