



**Ngobi v Kenya Ports Authority & others (Civil Case
87 of 2013) [2023] KEHC 20410 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 87 OF 2013
DKN MAGARE, J
JULY 4, 2023**

BETWEEN

BOB THOMPSON DICKENS NGOBI PLAINTIFF

AND

KENYA PORTS AUTHORITY & OTHERS DEFENDANT

RULING

1. The application dated 25/4/2023 was heard and slated for ruling today. The application sought the following prayers:
 - a. N/A
 - b. The court do grant orders directing that the third defendant to permit the plaintiff or authorized agent and a motor vehicle valuer to access motor vehicle high lander, CHS JTEES42A092133819 and issue a report to the court on the status of the motor vehicle.
 - c. That the plaintiff be granted leave to re reopen his case for purpose of producing the motor vehicle valuation report.
 - d. The defendants be and are hereby directed to release motor vehicle high lander, CHS JTEES42A092133819, forthwith to the plaintiff and facilitate its transit to Uganda on such conditions as the court shall deem fit to grant pending hearing and determination of the suit.
 - e. The costs of the application be in the cause.
2. The grounds are on the application's face. The same relates to the 15-year limit for importation into Uganda. The period is about to expire while the motor vehicle highlander, CHS JTEES42A092133819, is still at the port.



3. The application is supported by the affidavit of Bob Thomson Dickens Ngobi, the plaintiff. They cry from him is that if the motor vehicle is not allowed to enter the country, it will be a total loss.
4. The Respondent opposes the application. This is a classic case of litigation by installments.
5. Nevertheless, I do not find the opposition serious except for the conditions upon which the release is made.
6. I am aware that the motor vehicle is for export, and only certain insurers can handle such a case. There are no taxes due since the goods in question are marked for transit.
7. The only requirement is a bond pursuant to Section 87 of the East African Customs Management Act. The bond is applicable only where the goods are in the country.
8. The conditions KRA placed on the release of the motor vehicle high lander, CHS JTEES42A092133819 are that: -
 - a. The same be done procedurally from Port police to customs warehouses with rent payable to be fully paid or waiver be obtained
 - b. Entry bond be made and such will be canceled upon exit from the borders of Kenya.
 - c. A zero manifest may be made. The same to move near the Regional Electronic Cargo Tracking system.
 - d. There be release from KPA and the Shipping line.
 - e. The vehicle to move on the gazetted exit points only.
9. The 2nd defendant opposes the same as there are obligations for the motor vehicle being the amount of USD 37,000.00.
10. Demurrage and other charges are not paid. They do not have any objection except as aforesaid. The 1st defendant did not reply to the application
11. There is absolutely no utility in keeping the vehicle in the customs or port premises. It is a waste of space, as the vehicle is not needed. The Plaintiff is also under duty to mitigate losses. This also applies to the other Respondents. No one knows the outcome of the case. Thus, it is important for parties to mitigate losses in this early stage. Grandstanding will not help.
12. In *South Nyanza Sugar Company Ltd v Donald Ochieng Mideny* [2018] eKLR, Justice DS Majanja held as doth; -

“In addition to the aforesaid broad principle, the Respondent had a duty to mitigate damage. Viscount Haldane, LC., in *British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London Limited* [1912] AC 673 summarized the principle as follows:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps.”



13. Further, in *Eliud Maniafu Sabuni v Kenya Commercial Bank* [2002] eKLR, the court, hon Justice A.G RINGERA, as then he was, stated as doth: -

“I have considered the above evidence and submissions on this aspect of the matter. I agree with counsel for the plaintiff that the cases show that damages for loss of a user of a motor vehicle are awardable in appropriate cases.

Indeed as I have stated herein above when propounding the general principle of compensation, the plaintiff is entitled to damages for both the value of the chattel destroyed by the defendant’s tortious act and any reasonable consequential loss. And none of the cases cited by the defendant repudiate that principle. All they do is emphasize, correctly, that special damages – and loss of user as an item of special damage – must be pleaded and strictly proved and that the plaintiff is under a legal duty to reasonably mitigate his loss.”

14. I have considered the application. It is merited, though brought several years into the case. The orders sought are mandatory in nature. The applicant stands to suffer irreparably. None of the defendants is interested in the said motor vehicle. Each is interested in their pound of flesh.

15. In the case of *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] eKLR, the Court of Appeal, was of the considered view that; -

“As this Court stated in *Kenya Breweries Limited & another v. 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.

16. A mandatory injunction should not be granted on an interlocutory application without special circumstances. In the case referred above, *Kenya Breweries Ltd & Another v Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as doth:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of 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.”

17. The courts have been reluctant to grant mandatory injunction at the interlocutory stage. The Court of Appeal in the case in *Shariff Abdi Hassan v Nadhif Jama Adan* [2006] eKLR restated the position on mandatory injunction as follows: -

“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.”



18. A mandatory injunction is different from a prohibitory injunction in the sense that in a prohibitory injunction, the applicant must establish the existence of a prima facie case with high chances of success. on the other hand, in mandatory injunction, the applicant must exist in special circumstances. this was so held in the case of Kenya Power & Lighting Co. Ltd v Samwel Mandere Ogeto [2017] eKLR, the high court sitting at Kisii, stated as doth:

“20. A mandatory injunction is different from a prohibitory injunction in the sense that while an in prohibitory injunction the applicant must, as was stated in the celebrated case of Giella v 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. For an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. In the case of Nation Media Group & 2 Others v John HarunMwau [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.”

20. I am satisfied that this matter warrants the issuance of mandatory orders subject to security. This will ensure that the subject matter is not destroyed and, at the same time, make use of the vehicle.

21. I, therefore, allow the application. I shall issue directions immediately after the ruling regarding the hearing of the main suit.

Determination.

22. Therefore, I allow the application in the following terms: -

- i. The Plaintiff is hereby authorized to access Motor Vehicle Registration Number Highlander CHS JTEES42A092133819 and value the same through Automobile Association of Kenya(AA) and file a further list of documents related thereto and testimony be produced only in respect thereto.
- ii. The defendants are directed to release to the plaintiff directly or through his authorized agents the Motor Vehicle Registration Number Highlander CHS JTEES42A092133819 forthwith to facilitate transit to Uganda, subject to (iii) and (iv) below.
- iii. The release order will be made subject to payment or undertaking to pay the freight and shipping charges, demurrage, and other charges due or getting appropriate waivers, if any.
- iv. The plaintiff to comply with requirements of the law in relation to transit goods.
- v. The 3rd Defendant to issue the Plaintiff with a zero manifest to enable conclusion of the matter.



- vi. The Plaintiff's case be reopened only in the next hearing date to produce any document from his exercise.
- vii. The orders issued herein shall automatically lapse by 6/11/23
- viii. Costs in the cause.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF JULY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.
DENNIS KIZITO MAGARE**

JUDGE

In the presence of:

Macharia for the plaintiff

Chelang'at for 3rd defendant

No appearance for the 2nd Defendant

Court Assistant - Firdaus

M.D. KIZITO, J.

