



**Kalpaka Processing Company v Alpha Pharm Uganda Ltd & 2 others;
Mediterranean Shipping Company SA & 4 others (Interested Parties) (Civil
Appeal E024 of 2023) [2023] KEHC 23654 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E024 OF 2023
DKN MAGARE, J
OCTOBER 4, 2023**

BETWEEN

KALPAKA PROCESSING COMPANY APPLICANT

AND

ALPHA PHARM UGANDA LTD 1ST RESPONDENT

ALPHA PHARM (PTY) LTD 2ND RESPONDENT

NEIL SWART 3RD RESPONDENT

AND

MEDITERRANEAN SHIPPING COMPANY SA INTERESTED PARTY

OCEAN FREIGHT (EA) LIMITED INTERESTED PARTY

KENYA PORTS AUTHORITY INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

UGANDAN REVENUE AUTHORITY INTERESTED PARTY

RULING

1. I have perused the application dated 18/9/2023. The parties appeared before me today. The defendant has not appeared. Though have not opposed the application.
2. I am aware that the Order being sought Mandations in its nature. The applicant has shown that the goods are perishable. This are special circumstances warranting issuance of a mandatory order.
3. The shipping line confirms that the cargo has not been claimed. The Kenya Revenue Authority has claim over taxes. This is the same with the Kenya Ports Authority who are interested in their charges



given the perishable nature of the cargo, it seems no purpose to keep the same herein. If there are other claims, they can be dealt with by way of a counter claim for value in the suit.

4. In issuing mandatory injunction, the Court is aware that the standards are higher than the normal prohibitory injunction.
5. In the case of *Joseph Kaloki t/a Royal 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* [2020] eKLR a mandatory injunction can be granted on an interlocutory applications as well as 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 think sit ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

6. In the case of 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 or special circumstances, and then only in clear cases either where the court thought that the mater 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.”

7. The Court of Appeal in the case of stated in *Shariff Abdi Hassan v Nadbif Jama Adan* [2006] eKLR rested 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 sated that the party against whom the mandatory injunction is sought 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. In the case of *Kenya Power & Lighting Co. Ltd v Samwel 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 the 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 is favour, an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunctions must prove his case on a standard higher than the standard in prohibitory injunctions.”



9. In the case of *Nation Media Group & 2 others v John Harun Mwau* [2014] eKLR, the Court of Appeal said: -

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

10. In the circumstances, I make the following orders:-

- a. The shipment under bill of lading No meduzw045260 be released to the applicant who shall immediately repatriate it back to the country of origin or transship the same pending hearing and determination of the case.
- b. The plaintiff to pay all requisite port charges, shipping and freight charges and comply with all requirements for transshipment.
- c. The interest parties to facilitate execution of the orders.
- d. The court shall determine the other issues through case stated.
- e. Upon compliance with the orders herein the interested parties to be removed from proceedings.
- f. Mention for Highlighting on 7/11/2023

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF OCTOBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ochieng for the plaintiff

Mr. Muge for the 3rd Interested party

Miss Ndeti for 1st and 2nd Interested party

Miss Wambui for 4th interested party

Court Assistant - Brian

