



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CONSTITUTIONAL PETITION NO. 1 OF 2020

IN THE MATTER OF ARTICLES 1,2,3,10,21,28,39,40,47,49,174, 259 & SCHEDULE 4 OF THE CONSTITUTION

AND

IN THE MATTER OF MAKUENI SAND CONSERVATION & UTILISATION ACT, 2014

AND

IN THE MATTER OF VIOLATION OF ARTICLES 39,40,47,49 & 50 OF THE CONSTITUTION OF KENYA

BETWEEN

JULIUS MAWEU KILONZO....PETITIONER/APPLICANT

-VERSUS-

MAKUENI COUNTY SAND CONSERVATION &

UTILISATION AUTHORITY.....RESPONDENT

RULING

1. The application for determination is dated 2/02/2020. It is brought under sections 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 10, 23, 40, 47, 49, 159 & 259 of the Constitution of Kenya 2010 and all other enabling provisions of the law. It seeks the following orders;

a. Spent.

b. That this Honourable court be pleased to give an order directed to the Respondent to release a lorry registration number KBK 010N to the Petitioner/Applicant pending the hearing and determination of this application.

c. That this Honourable court be pleased to give an order directed to the Respondent to release a lorry registration number KBK 010N to the Petitioner/Applicant pending the hearing and determination of this petition.

d. That costs be provided for.

2. The application is premised on the grounds on its face and the applicant's supporting affidavit sworn on the same day and a supplementary affidavit sworn on 09/03/2020. The Applicant deposed that the subject lorry was arrested and detained by police officers on 05/02/2020 and then handed over to the Respondent on 06/02/2020 and has been in the Respondent's custody to date.

3. He deposed that he is the registered owner of the lorry which he uses to harvest sand, fetch charcoal and firewood, deliver goods and food as well as other commercial purposes. A copy of the logbook was exhibited as **JMK-A**. He also exhibited a demand letter to the officer in charge-Maiani Police Post as **JMK-B**

4. He further deposed that the officers who arrested the lorry claimed that it was illegal to harvest and transport sand and they insisted on arresting the lorry even after being shown the licence. A copy of the licence was exhibited as **JMK-C** and a payment receipt for the licence was exhibited as **JMK-D**. That the arresting officers demanded for bribes to release the lorry but the driver refused.

5. Upon such refusal the lorry was afterwards driven to the respondent's yard in Wote. It was around the same period that he received a response to his demand letter whereupon the police distanced themselves from the lorry saga. The response is exhibited as **JMK-E**. He denied having been furnished with a complaint, claim, bill or reason for the arrest of his lorry and the driver has never been charged in court.
6. He complained that being a businessman he is losing a lot since he cannot utilize the services of his lorry, yet he is servicing a loan for its purchase.
7. The application is opposed through the replying affidavit of Halinishi Yusuf, the Respondent's managing director, sworn on 03/03/2020. He deposed that the Respondent is established under section 3 of the Makueni County Sand & Utilisation Act, 2015 (*the Act*) and has oversight of all sand and related activities within the county.
8. He averred that under section 6(2)(d) of the Act, the authority monitors and assesses activities, including activities by relevant agencies. This is for purposes of ensuring that the environment is not degraded by such activities, that sand conservation objectives are adhered to and that adequate early warning on impending sand related environmental emergencies are given.
9. He deposed that section 6 (2)(l) gives the authority powers to license and register all persons who wish to engage in any sand utilization activities. On 05/02/2020 (*material day*) at around 3.31pm, the Respondent's enforcement officers together with police officers from Maiani police post, acting on alert from citizens that there was a motor vehicle harvesting sand illegally from Unene river, proceeded to the said river and found the lorry harvesting sand contrary to the provisions of the Act.
10. It is his desposition that the said lorry is licensed to harvest and transport sand for local and commercial use under license No. GMC/624/MCSCUA/718/LCNS/KBK 010N which he exhibited as **HY-1**. That no cess fee had been paid before harvesting the sand and it was only paid after inquiry. (*copy of the transaction as HY-2*).
11. He further deposed that the lorry was also in contravention of condition 3 of the license and sections 29 (2) and (4) of the Act which require sand harvesting to be carried out on designated areas and not to be done within 100 meters of either side of any physical structure including bridges, roads, railway lines, dykes etc. That the sand harvesting was taking place at Usi Nene river which is less than 20 meters from the bridge.
12. Further, he deposed that the lorry was pulled out of the mud and driven to Maiani police post in the company of Julius Muthoka, the Respondent's administrator of Mukaa sub county ward. It was booked under occurrence book No. 04/05/02/2020 and released to the Respondent's yard awaiting pressing of charges against the driver and/or owner of the lorry. The lorry driver fled from the scene hence attempts to charge him became futile as police were unable to arrest him.
13. He denied the allegations of bribery and deponed that no such report has been made to the authorities hence the Applicant's intention is to taint the image of the authority and belittle its efforts in discharging its mandate. He deposed that since the lorry was impounded, neither the owner nor driver have made inquiries at the Respondent's office.
14. He deponed that the prayer for release of the lorry is final in nature and can only be granted after all the issues have been ventilated but if the court is persuaded to grant it, the Applicant should deposit monetary security to ensure that the matter is canvassed to its logical conclusion.
15. Further, that Article 40(3)(b) allows the State to deprive a person of their property if the deprivation is for the public interest. That continued sand harvesting and transportation by the Applicant is an infringement of Article 42 of the Constitution on the right to have the environment protected for the benefit of the present and future generations through legislation and other measures. He averred that Makueni county is an arid and semi-arid area and is adversely affected by continued illegal harvesting and transportation of sand resulting to water scarcity.
16. It is also his deposition that the Applicant has not challenged the provisions of the Act and cannot therefore refer to the Respondent's acts as unlawful, irregular and erroneous. Further that the application is pre mature and in breach of section 16 of the Government Proceedings Act on whether the court can issue injunctive orders against the county government.
17. In a rejoinder, the Applicant deposed that that the response is an afterthought since there were still no charges against him or the driver and no warrant of arrest had been issued. He averred that the Act does not make the Respondent a court to the extent of arresting and convicting and does not give it powers to detain without trial. He has denied the claims of harvesting sand at undesignated areas and adds that the issue was never raised at the time of arrest.
18. He deposed that it was absurd for the Respondent to claim that the driver fled and wonders where they got the lorry keys if indeed he fled. He denied the allegation that the lorry got stuck. He has averred that after the detention, the driver went to the police station and to the Respondent's offices and was never arrested but told to tell his boss to give 'something small'. It was also his deposition that powers to limit rights as enshrined in the Constitution can only be exercised by the central Government and on limited occasions.
19. The application was canvassed orally by learned counsel Mr. Mwendwa for the Applicant and Mr. Mungai for the Respondent.

The Submissions

20. Mr. Mwendwa reiterated the contents of the Applicant's affidavits and on the allegations that the driver fled, he submitted that there was nothing in the OB to that effect and noted that even the demand letter (JMK-E) was delivered by the said driver. It was also his submission

that the Applicant and driver have been following up on the lorry and have never been arrested.

21. He prayed for the unconditional release of the lorry and submitted that the Applicant was willing to avail the lorry during the main hearing.

22. Mr. Mungai reiterated the contents of the replying affidavit and submitted that the officers of the Respondent had the mandate to impound vehicles in breach of the licence conditions. He submitted that the sand harvesters operate like economy banditry groups. He added that 5% of the revenue collected goes to the community but the acts of the sand harvesters make it impossible, for that to happen.

23. He submitted that if the court is inclined to grant the prayer, the same should be proportionate. He relied on **Nairobi HC Constitutional Petition No. 69 of 2016; Erastus Gituma T/A Muchui Builders & Anor. –vs –Kenya National Highway Authority (2016) eKLR** where the late Justice Onguto expressed himself as follows;

“32. The subject motor vehicles may go to waste if they continue to be detained. The roles and functions of the Respondent should however, not be gainsaid. The Respondent claims that the reason for detaining the motor vehicles is to ensure that any sanctions meted out are met. It would therefore be more appropriate and proportionate if the vehicles were released but on terms.

33. The upshot is that the application succeeds but on terms. Prayers number 3,4 & 5 of the application dated 23rd February 2016 are granted. I further order that pending the hearing and determination of this petition, the Respondent do release to Petitioner the Petitioner’s motor vehicle registration number KBR 500K and KBS 500K conditional only upon the Petitioner depositing as security in this court the amount of Kshs.200,000/= prior to the release of the motor vehicles. The Petitioner is also to execute and file an undertaking that he will not sell or lease or dispose of the subject motor vehicles until the petition is heard and determined.”

24. In rejoinder, Mr. Mwendwa submitted that the cess was paid at 3.30pm before the arrest and contended that even if it was paid after, there was no reason to hold the lorry and there is no provision for them to hold the lorry indefinitely.

25. Having considered the application, the replying affidavit, the rival submissions and all annexures, I find that the only issue for determination is whether the lorry registration number KBK 010N should be released to the Applicant pending the hearing and determination of the petition.

Analysis and determination

26. The preamble of the Act provides as follows;

“An Act of the County Assembly of Makueni to regulate and ensure sustainable conservation & utilization of sand & to provide for protection of the environment & equitable sharing of the accruing benefits & for connected purposes”

27. The Respondent is established under **section 4** of the Act to *inter alia* oversee the implementation of the objects and purpose of the Act as provided in **section 3** thereof. Section 3(a), one of the objects of the Act is,

“To provide for the sustainable conservation and utilization of sand within Makueni county through providing for establishment of the sand conservation and utilization Authority tasked with the oversight of all sand and related activities within the county and the sand conservation fund”

28. From the above, it is clear that the Respondent has the mandate to regulate sand activities within Makueni county and it is not in dispute that the Applicant’s lorry was within the Respondent’s jurisdiction at the time of arrest. It is also not in dispute that the Applicant has the requisite license to harvest and transport sand within Makueni county.

29. From the replying affidavit, the arrest was occasioned by breach of conditions 3 and 4 of the licence which require harvesting of sand from designated sites only and payment of required cess respectively. As for payment of cess, the Respondent contends that the fee was only paid after inquiry.

30. The exhibited M-pesa transaction shows that the payment was made at 15.49.03pm and the Respondent’s claim is that its officers found the lorry at the sand harvesting site at 3.31pm. In my view, the Respondent waived its right to complain when it accepted the cess payment despite being paid late. In any case, the condition does not specify whether the cess should be paid before or after the fact. It only states; ‘*pay required cess and display in the vehicle*’.

31. The mandate to impose conditions in the license are provided for by **section 24** of the Act which provides that;

“Except as otherwise provided in this Act, the Authority may, subject to this part, grant, renew, transfer or remove a license and may embody therein such conditions as it may deem appropriate or it may refuse to grant, renew, transfer, withdraw or cancel a license.

32. It is therefore evident that even the Act does not specify the time of paying the cess. Accordingly, the Respondent’s complaint on condition No. 4 is unfounded and was in any event waved upon receipt of payment.

33. The claim of harvesting from an undesignated area has been vehemently denied by the Applicant. Section 29(2) prohibits sand harvesting on riverbanks while section 29(4) prohibits sand harvesting within 100 meters of either side of any physical infrastructure including bridges,

roads, railway lines, dykes among others. The Respondent's claim is that the sand harvesting was taking place at Usi Nene River which is less than 20 meters from the bridge and their reason for not charging is that the driver fled.

34. Paragraph 3 of the response from the police (JMK-E) states as follows;

“The vehicle was released after the OCS Kilome informed the sand authority and the enforcement officers to take their lorry if they were not ready to charge the owner. The same was released to them where they escorted it to a place well known to themselves.”

35. Section 26 of the Act deals with breach and provides penalties for first, second and subsequent offenders. It is worded as follows;

“(1) Any person who harvests, sells and or distributes sand except under and in accordance with this Act, commits an offence and is liable;-

- a. For a first offence.....
- b. For a second or subsequent offence.....”

36. Further, the section has categorized offenders into loaders, drivers and vehicle owners. It is therefore clear that if indeed the driver fled, the Respondent had the option of charging the vehicle owner. This has not been done to date and the Respondent has not explained the failure to do so. I am inclined to agree with the Applicant that this whole narrative of fleeing is an afterthought to cover up the evident harassment. Further, there is no provision in the Act for indefinite detention of a motor vehicle even where breach has been proved.

37. I have also considered the fines prescribed in section 26 vis-à-vis the act of detaining the vehicle. The maximum fine that can be imposed under the Act is Kshs.200,000/= and in my view, detaining a lorry whose value is obviously much higher is not proportionate especially in light of the fact that no charges have been preferred on either the driver or the Applicant who is the registered owner.

38. The case of **Erastus Gituma (supra)** is distinguishable from the present case in that, the rules alleged to have been breached in that case expressly provided for detention of an offending motor vehicle as a form of punishment. In this case, the only forms of punishment prescribed are fines and imprisonment and there is nothing to show that the Applicant will be unable to pay a fine of Ksh.200,000/= in the event that he is charged and convicted.

39. The Respondent has not established a case against the Applicant that requires security to be furnished before release of the vehicle. Accordingly, I find absolutely no justification for further detention of the lorry and allow the application.

- i. The lorry will be released on condition that the same is NOT disposed of in any manner before the petition is heard and determined.
- ii. The Applicant MUST avail it in court whenever required before determination of the petition.
- iii. The petition must be fast tracked.

40. Costs in cause.

Orders accordingly.

Delivered, signed & dated this 3rd day of April 2020, in open court at Makueni.

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H. I. Ong'udi

Judge