



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 12 OF 2019

IN THE MATTER OF ARTICLE 2(4) AND 165(3) (D) (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10(2), 196 (1) AND 201 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 87, 88, 91, 115 AND 117 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF SECTION 102, 117, 125, 128 AND 129 OF THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND

IN THE MATTER OF SECTION 4, 6, 87, 91 AND 115 OF THE MACHAKOS COUNTY PUBLIC PARTICIPATION ACT OF 2014

AND

IN THE MATTER OF MACHAKOS COUNTY FINANCE ACT, 2019

BETWEEN

TRUCK VENTURES SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

COUNTY ASSEMBLY OF MACHAKOS.....2ND RESPONDENT

DIRECTOR OF FINANCE, MACHAKOS COUNTY.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Petitioner herein filed an application dated 3/6/2019 under certificate of urgency seeking for an order that the Petitioners Application dated 3rd April, 2019 be re-certified as urgent and same be forthwith heard.

2. The Application is supported by the Affidavit of Edward Gacau Kariuki Learned Counsel for the Petitioner who deponed *inter alia*: that the Petitioner had filed an Application dated 3/4/2019 seeking for the release of certain vehicles detained by the 1st, 2nd and 3rd Respondents;

that on the 24/4/2019 the court granted an order of release of several vehicles; that the 1st – 3rd Respondents released the vehicles but declined to release one more vehicle registration number KCS 170K Ashok Leyland despite the court order; that the Petitioners filed another application dated 30/04/2019 seeking for rectification of the courts order to include the said vehicle KCS 170K but which application could not proceed as the Respondents sought for the cross examination of the process server; that the initial application dated 3/4/2019 has not been heard; that Motor vehicle KCS 170K continues to lie in waste in the care of the 1st – 3rd Respondents despite there being valid court orders for its release and which has caused the Petitioners great frustration, loss of business and damage; that there is urgent need to have the Application dated 3/4/2019 re-certified as urgent and be heard forthwith.

3. This court upon receipt of the Petitioner's Application aforesaid directed that the same be served upon the Respondents and that the parties do appear before the court on the 11/06/2019 for directions.

4. Learned counsels for the Petitioner and the 1st – 3rd Respondents appeared before me on the 11/06/2019 and sought for certain directions. Mr. Kariuki for the Petitioner sought for directions *inter alia*; that the application dated 3/4/2019 be re-certified as urgent and a hearing date be given; that this court give clear and unambiguous directions that pending the hearing of the application dated 3/4/2019 the Respondents do comply with the court orders dated 24/4/2019 by unconditionally releasing motor vehicle registration number KCS 170K; that the 1st – 3rd Respondents be denied audience before this court until they confirm that the orders of 24/4/2019 have been complied with; that the Respondents should file a formal application seeking stay of the orders on the ground that their clients were not served so as to enable the Petitioner respond formally; that the **Petition No.6 of 2019** was consolidated with **Judicial Review No.191 of 2019** in which the same is scheduled for judgement on the 29/07/2019; that no consent was reached to have the present counsel for the Petitioner Edward Kariuki to be cross – examined regarding the issue of service of the application dated 3/4/2019 upon the 1st – 3rd Respondents and that a formal application should be first filed before the intended cross-examination is conducted.

Mr. Muumbi Learned Counsel for the 1st and 3rd Respondents submitted that the Respondents are not in contempt since the particular vehicle was not among those sought to be released vide the order. He further submitted that the order for the cross – examination of the process server is still in force and should be conducted first as the Respondents will show that they had not been served and further that the present counsel for the Petitioner had earlier indicated before court that he was ready to be cross – examined since he is the one who had effected service of the Application upon the Respondents.

Mr. Muoki for the 2nd Respondent submitted that the Petitioner's application dated 3/6/2019 has not been responded to by the 2nd Respondent because the matter had been fixed for mention for directions but however the 2nd Respondent is ready to respond if granted leave to do so. He further submitted that the orders granted on the 24/4/2019 by this court were obtained through misrepresentation of facts as the Respondents had not been served and hence the need to cross –examine the process server.

5. I have considered the sentiments of learned counsels for the Petitioner and the 1st – 3rd Respondents. Before proceeding to give directions in this matter, I find it is necessary to delve into the background of this matter. The Petitioner filed the initial application dated 3/4/2019 which was ordered to be heard before Odunga J as there was a related **Petition number 6 of 2019**. On the 24/4/2019 the Petitioner sought for some interim orders in terms of prayer 3 of that application which were duly granted as there was evidence that the Respondents had been served but who did not attend court on the said date. Apparently, the Petitioner obtained the court order and several vehicles were released by the Respondents but one vehicle was not released. This then compelled the Petitioner to file the application dated 30/4/2019 seeking for rectification of the order so as to incorporate the remaining vehicle registration number KCS 170K Ashok Leyland. The earlier Application dated 3/4/2019 could not be dealt with by Odunga J as it became necessary for this court to finalize the Petitioner's Application dated 30/4/2019 after which the other court could then proceed to handle the application dated 3/4/2019. The 1st – 3rd Respondents filed replying affidavits in opposition to the said Application dated 30/4/2019 and they sought to have the process server cross - examined regarding the aspect of how service of the Application dated 3/4/2019 had been effected upon the Respondents. It is the contention of the Respondents that they had not been served and hence this court had been misled into granting the interim orders on the 24/4/2019. The parties were then to take hearing dates for the Application dated 30/04/2019 when the Petitioner filed the present application dated 3/6/2019 seeking to have the initial application dated 3/4/2019 re-certified as urgent and given a hearing date forthwith.

6. From the above chronology of events, it is quite clear that the application dated 3/4/2019 is to be canvassed before Odunga – J as it is related to **Petition Number 6 of 2019** which is pending before that court. The only application pending for determination before this court is the one dated 30/04/2019. It is therefore surprising for the Petitioner to bypass this application and seek to have the earlier one given a hearing date despite the fact that Odunga J had directed on the 28/05/2019 that the parties canvass the application dated 30/4/2019 before this court after which the application dated 3/4/2019 could be placed before him to handle it. Even as the parties canvass the application dated 30/4/2019 the interim orders issued on the 24/04/2019 are still in place and in force. The Respondents in response to the application dated 30/4/2019 appeared to suggest that they intend to have those orders discharged on the ground that the court had been misled by the Petitioner. The Respondents have expressly made it clear that they will be seeking to cross – examine the process server with a view to establishing that the Respondents had not been served contrary to the assertions by the Petitioner. The Petitioner's Counsel who had effected service confirmed before this court on 6/5/2019 that he was very much ready to be cross – examined regarding the issue of service of the application. That being the position I find no prejudice will be suffered by the Petitioner if the same is conducted as the issue in controversy namely the service of the application upon the Respondents will be thrashed out.

7. After analyzing the submissions of the learned counsels as well as the court record, I hereby proceed to issue the following directions namely:-

(a) The petitioner's Application dated 3/6/2019 seeking to have the Application dated 3/4/2019 re-certified as urgent is hereby stayed pending the determination of the application dated 30/4/2019.

(b) The parties herein are directed to set down the application dated 30/4/2019 for hearing as a matter of priority. In the meantime leave is granted to either party to file and exchange responses within seven (7) days from today if they haven't filed them already.

(c) Interim orders issued on the 24/4/2019 shall remain in force pending the determination of the application dated 30/4/2019.

(d) The issue of the cross – examination of the process server who effected service of the application dated 3/4/2019 upon the Respondents shall be canvassed alongside the application dated 30/04/2019. To this end leave is granted for the summoning of the process server for the aforesaid purpose.

It is so ordered.

Dated and delivered at Machakos this 14th day of June, 2019.

D.K. KEMEI

JUDGE