



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 25 OF 2015

GLOBAL ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MAKUENI.....1ST DEFENDANT

MARK WAMBUA MUTHOKA.....2ND DEFENDANT

RULING OF THE COURT

The Background

1. By a Plaint dated **19th May, 2015** the plaintiff filed the current suit seeking injunctive orders, general damages, costs and interests against the defendant on account of an agreement or contract dated **22nd April, 2015** under which the plaintiff allegedly hired motor vehicles registration numbers KCA 575D, KCA 879B and KBD 127J from a 3rd party for the purposes of providing trucking services. Those motor vehicles were allegedly unlawfully impounded and detained by the defendant causing the plaintiff to suffer for which suffering it now seeks the above orders.
2. Subsequently, the plaintiff filed an application dated **19th May, 2015** seeking injunctive orders against the defendant in relation to continued impounding of the said motor vehicles and their possible sale.
3. The defendants have raised the current Preliminary Objection dated 11th November, 2015, raising the following grounds;
 - a. The court does not have jurisdiction over the present matter. The matter in dispute relates to the environment and the power and function of the 1st defendant to conserve the soil and water in accordance with Section 10 of Part 2 of the Fourth Schedule to the Constitution. The present dispute relates to Land and Environment whose appropriate forum for resolution is the Environment and Land Court.
 - b. **Article 165(5)(b)** of the **Constitution of Kenya, 2010** takes away the jurisdiction of the High Court in relation to matters of the Environment and Land which are adjudicated by the Environment and Land Court contemplated under **Section 162(2)(b)**.
 - c. The plaintiff has by the said orders continued to carry out an illegality as it has not been licensed by the defendant to carry on the business of scooping and transporting sand within Makueni County as contemplated in **section 7(b) of Part 2** of the **Fourth Schedule** to the Constitution. The court cannot be used to promote an illegality.

d. Injunctions cannot be granted against Government unless it relates to rights and fundamental freedoms. The defendant is a government and, therefore, **Section 16** of the **Government Proceedings Act** applies in this case.

Submissions

4. Parties filed submissions which I have considered. In my view the simple issue for determination is whether the matter before the court belongs to this court or to the Environment and Land Court. The defendant's Preliminary Objection, at grounds 1 and 2 thereof, challenge the jurisdiction of this court to issue the orders sought by the plaintiff in the plaint. It is the defendants' contention that the dispute herein is an environment dispute relating to use of land. Accordingly, the defendants contend that the proper forum for the resolution of the dispute is the Environment and Land Court as provided for in **Article 162(2) (b)** and **165(5) (b)** of the **Constitution**. The defendants have cited the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Limited (1969) E.A 696** in which Sir Charles Newbold P observed as follows, in relation to Preliminary Objection;

“...the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of point by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

5. The plaintiff's suit as against the decision of the defendants to detain motor vehicles KCA 575D, KCA 879B and KBD 127J without any order of court and or any legal instrument backing such detention is well articulated in paragraphs 9, 10 and 11 of the Plaint dated 19th May, 2015 and filed in court on 20th May, 2015. In the aforesaid paragraphs, the plaintiff avers as follows:

i. The detention of the said motor vehicles is illegal and unlawful as there is no ground or justifiable reason to warrant the defendant's action nor do the defendants have any valid order/decreed for such detention and therefore the plaintiff prays for mandatory injunction to have the said motor vehicles released.

ii. By reason of the illegal seizure and detention, the plaintiff has suffered loss and continues to do so besides the loss of business reputation to the contractor and other clients.

iii. The plaintiff further avers up to date, no charge or specific complaint has been leveled against the plaintiff or any other person related to this matter.

6. It is manifestly clear from the plaintiff's pleadings that its dispute against defendants is civil in nature. This is further demonstrated by the prayers sought by the plaintiff in the plaint which include an injunction against the defendants as well as general damages.

7. On the other hand, the jurisdiction of the Environment and Land Court is purely related to land use. **Section 13** of the **Environment and Land Court Act** provides that the court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2) (b)** of the **Constitution** and with the provisions of the Act or any other law applicable in Kenya relating to Environment and Land. **Subsection (2)** provides that in exercise of its jurisdiction under **Article 162(2) (b)** of the **Constitution**, the court shall have power to hear and determine disputes-

i relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

ii. relating to compulsory acquisition of land;

iii. relating to land administration and management;

iv. relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and

v. any other dispute relating to environment and land.

8. It is the finding of this court that for the defendant's preliminary objection to stand, it must be shown first, that the plaintiff's suit falls within any of the limbs provided for in **section 13(2)** of the **Environment and Land Court Act**, quoted above. The plaintiff submitted correctly in the view of this court that there is no dispute relating to environment and land use. Therefore, this suit is properly before this court.

9. Given the facts as pleaded by the plaintiff, it is clear that the defendants' Preliminary Objection does not meet the criteria set in ***Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Limited (1969) E.A 696***. The said Preliminary Objection is herewith dismissed with costs to the plaintiff.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Miss Ngugi – for Malelu for Defendants

No appearance for Wanjohi – for Plaintiff