

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MALINDI

CIVIL SUIT NO.29 OF 2015

SAB HAULIERS LTD.....PLAINTIFF

VRS

KREMEPOINT LOGISTICS LTD.....1ST DEFENDANT

**MAGARINI SAND CO-OPERATIVE SOCIETY
LTD.....2ND DEFENDANT**

RULING

The application dated 31/7/2015 seeks to restrain the respondents from levying any charges upon the applicant except cess of ksh.100/- payable to the County Government of Kilifi. The applicant is also seeking orders restraining the respondents from interfering with its sand harvesting and transporting business. The application is supported by the affidavit of Salim Ali Abdalla of the same date and a supplementary affidavit of the same person sworn on 11th August, 2015. The 1st respondent filed a replying affidavit sworn by Joseph Munyoki Nzioka on 10/8/2015 while the 2nd respondent filed a replying affidavit sworn by Samuel katana Charo Tuva Konde on 10/8/2015.

Mr. Mouko, counsel for the applicant submitted that the plaintiff is a private company licenced to harvest and carry sand. It has all the relevant licences from the National Environment Management Authority (NEMA) as well as from the County Government of Kilifi. It is further stated that the two defendants have their own private arrangements whereby the 2nd defendant has allowed the 1st defendant to collect levies on its behalf for sand harvested from its own members. The applicant's position is that it is harvesting sand from specific plot owned by a non-member.

Mr. Mouko contends that the defendants have put several conditions for harvesting sand in Magarini area including issuance of permits and payment for weighbridges. The defendants are levying taxes including VAT, NEMA, Education fund and Weigh Bridge fees yet the plaintiff is not a member of the 2nd defendant. The weighbridge is only meant to weigh the sand for purposes of computation of cess. The defendants' activities are contrary to the provisions of the Competition Act.

Miss Nanjali, counsel for the respondents opposed the application. Counsel contends that the second defendant society was formed with a view to helping the people of Magarini. The sand harvester excavate sand and do not rehabilitate the land after excavation. Part of the levies being charged is used to educate the children of the members of the 2nd defendant while part of it is paid to NEMA, VAT and costs of the weighbridge. The 1st defendant collects ksh.275/- per tone on its behalf. The land in Magarini belong to members of the 2nd defendant. Miss Nanjali maintains that the applicant is excavating sand from one Jackson karisa Kombe who is a member of the 2nd respondent as opposed to the contention that the sand is harvested from plot number Ngomeni/Squatters Scheme/113.

It is submitted for the defendants that no irreparable damage will be suffered. This is a monetary claim and any damage can be compensated. The County Government of Kilifi charges ksh.120 per ton which is a separate charge.

The applicant's position is that it is a private company engaged in sand harvesting and transporting. It operates its business in Magarini. It has acquired all the relevant licences. The applicant is willing to pay the cess of ksh.120/- per ton payable to the county Government of Kilifi. That amount is free from any weigh bridge charges. Since the applicant is not a member of the 2nd defendant, it should not be subjected to payment of other levies. This is contrary to competition laws as the 1st defendant is also in the same business. The two affidavits of Salim Ali Abdalla summarized the applicant's contention. According to the applicant, the sand is being harvested on plot number 113 Ngomeni Squatter Settlement Scheme. The applicant pays its VAT and other levies including those charged by NEMA.

The defendants' position is that sand harvesting leads to damage to the land, rehabilitation is required. The people of Magarini formed a society and all those who go to Magarini to harvest sand have to be licenced by the 2nd defendant. The 2nd defendant contracted the 1st defendant to collect the levies on its behalf. The collected funds are used to educate the children of its members as well as rehabilitate the land.

Both parties are in agreement that the County Government of Kilifi is expected to collect cess. It seems the cess was initially ksh.100 per ton but has now increased to ksh.120/- per ton. The applicant is not against the payment of that cess. Its main contention is the extra ksh.275/- being charged per each ton.

The pleadings show that there was **Malindi High Court Civil Case No.16 of 2014** between **Twaha Abdulhakim Abdalla v The County Government of Kilifi** and the two defendants herein. I have gone through the ruling of Justice C. Meoli delivered on 21st October 2014. Apart from the issue involving clamped motor vehicles in that case, the rest of the issues are similar to this case. The only outstanding issue is whether the defendants should be stopped from collecting ksh.275/- per ton of sand from the applicant. It is clear that the applicant's contention is based on the position that it is not a member of the 2nd defendant and that the sand is being harvested from a non-member's land.

It is quite difficult at this stage to conclude with finality as to where the sand is being harvested. The defendants have annexed an official search for plot number Ngomeni Squatter Scheme/1113 issued on 12th August 2015. It is indicated that the land belongs to Jackson Karisa Kombe. The applicant annexed a lease made on 14th January 2014. The lessors are Michael Kwicha Kazungu and Mtawah Machuko. The lease does not describe the plot number and only indicate that it is for "**8 pcs of 10 steps by 10 steps**" Plot of River Sand Quarry at Ngomeni. This is contracting to the averments of Salim Ali Abdalla at paragraph 4 of this main affidavit in support of the application. It is not clear whether Jackson Karisa Kombe is a member of the 2nd defendant. The applicant annexed a list of the members but the same is not quite clear. It is also not established whether the list is exhaustive.

The applicant is expected to establish that it has a *prima facie* case with a probability of success or that if the orders being sought are not granted, the plaintiff will suffer irreparable damage and loss which cannot be compensated by way of damages. The 2nd defendant is a Cooperative society governed by its own procedures. It cannot impose itself on non-members. However, as contended by the defendants, it

would be irresponsible to allow private companies to go into the area, excavate sand and transport it, possibly using the same roads being repaired and rehabilitated by the 2nd defendant without imposing certain levies. For the court to grant the orders being sought at this stage, it has to be satisfied that the applicant is harvesting its sand from a different area quite far from where the members of the 2nd defendant are located. If that is the case, then upon it being established, the court can restrain the defendants as prayed. As of now, it is clear that the sand is being harvested from the same area where the members of the 2nd defendant are located. The plaintiff seems to be using the same facilities as the defendants to access the sand. It is also not clear at the moment as to whether the applicant is the only private company subjected to the levies. To grant the orders at the interlocutory stage might create chaos to the sand harvesting business at the area. It would have been prudent for the applicant to have caused the two lessors of the land leased to them to have sworn affidavits and indicate their title number and that they are not members of the 2nd defendant. The plaintiff has failed to prove that the alleged lessors are the owners of plot numbers 113 Magarini Squatters Settlement Scheme.

In the end, I do find that the application herein lacks merit and the same is dismissed. I would wish to echo the sentiments of Justice Meoli that the parties here can settle the dispute in an amicable manner out of court. The dispute involves business operation being carried out at Magarini area. Costs shall follow the outcome of the main suit.

Dated, signed and delivered at Malindi this 8th day of October, 2015.

SAID J. CHITEMBWE

JUDGE