



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 15 OF 2013

ISMAEL ABDI

**ANNE KANAI (SUING AS CHAIRMAN & SECRETARY RESPECTIVELY OF SEED
SAMBURU EMPOWERMENT THROUGH DEVELOPMENT (SEED
SAMBURU)).....PLAINTIFFS/RESPONDENT**

VERSUS

JOHN LEPIL LOKILE.....DEFENDANT

RULING

1. This Ruling relates to two applications by Defendant/Respondent namely-

- (i) the Notice of Motion dated 11.02.2013 in which the Defendant/Applicant seeks a stay of the ex parte injunctive orders granted on 6.02.2013, and/or any consequential orders thereof,
- (ii) the Notice of Motion dated 22.04.2013 seeking a review of this court's orders made on 17.04.2013 in which the court directed the release to the Plaintiff/Respondent of motor vehicles cited therein.

2. To facilitate determination of both Applications. I directed counsel for the respective parties to file and exchange written submission on both applications. Counsel for the Defendant/Applicant filed their submissions on 23.09.2013, and they are dated 17.09.2013. Submissions by counsel for the Plaintiff/Respondent dated 28.10.2013 were filed on 29.10.2013. I have perused both Applications as well as the respective counsel's submissions together with the authorities cited by both counsel, I will consider each of the applications in turn.

3. THE APPLICATION OF 11.02.2013

3.01 That Application sought the following orders-

- 1. pending the hearing and determination of the instant application inter partes, the court be pleased to stay the execution of the ex-parte injunction granted on 6.02.2013 or any consequential orders,*
- 2. ...that the court be pleased to set aside, vary, rescind or vacate the ex-parte injunctive orders dated 6.02.2013.*

3.02 When this application came before me on 14/02/2013 counsel for the respective parties reached a compromise and the injunctive orders were lifted on motor vehicles Registration No.

KBS 525J (the Prado) and KAN 270H, (the Lorry) on terms that the two motor vehicles were to be returned to the Plaintiff/Respondents at the end of campaign period.

4. When those conditions were not met, Counsel for the Plaintiff/Respondents filed on 19.03.2013 a Notice of Motion dated 14.03.2013 in which the Plaintiff/Applicants sought *inter alia* leave to cite the Defendant/Respondent for contempt of court. This Application was heard and determined in a Ruling delivered on 24.05.2013 in which I dismissed it with costs (though that Ruling is the subject of another Application dated 3.06.2013 for review and/or setting aside).

5. However by an order made on 17.04.2013, I directed that said motor vehicles Lorry Registration No. KAN 270H, Land Cruiser Registration No. KBS 525J (Prado), Tractor Registration No. KTCB 064J and Motor Bike Registration No. KMCC 690S, be returned to the Plaintiff/Applicant forthwith, pending the determination of the suit regarding ownership.

6. I also granted leave to either party to apply. I think that this is genesis in particular of the Defendant's Application of 22.04.2013 for review of the orders of 17.04.2013.

7. It is important I think, to make it clear that the orders of 17.04.2013 were made on the basis *inter alia* that the campaign period was over (after 4.03.2013- *General Elections*), and the fact that the Defendant had not returned the said vehicles, in particular the Lorry and Prado, (as ordered on 14/02/2013), and counsel for the Defendant/Applicant who was new - the previous Advocate having been replaced), did not fully understand the genesis of those orders, and apologized for the non-compliance with those orders. Having understood the situation, and the orders having been substantially complied with (except for the lorry which is said in poor mechanical condition and immobilised), I am surprised by the Defendant/Applicant's Application of review and/or setting aside of the orders of 6.02.2013, and by implication all the subsequent orders, including the orders of 17.04.2013.

8. There are basically two grounds (as argued by *Dr. Khaminwa, learned Counsel for the Plaintiff/Respondent*) why those orders cannot be granted.

9. **Firstly**, the orders have been acted upon. Once orders have been acted upon, they can only be reversed by review or appeal to set them aside. An appeal from the decision of this court would lie to the higher, Superior Court, the Court of Appeal. The Defendant/Applicant has not yet chosen that path, he has sought a review, and that is the second ground why the application cannot be granted.

Under our law, specifically Order 45 Rule 1 of the Civil Procedure Rules, a review can only be entertained on the following grounds -

(a) where new and important matter of evidence is discovered and produced, which was, at the time of the decree or order was made, with the exercise of due diligence not possible to produce, or

(b) on account of some mistake or error apparent on the face of the record; or

(c) any other sufficient cause (analogous to new and important matter of evidence or error on the record).

That is the holding in many numerous authorities including **KENYA GAME HUNTING & SAFARIS WORKERS UNION VS. GALAXY CROCODILE LTD** [2013] eKLR.

In this case, the contention by the Defendant/Applicant that he is the registered and beneficial owner of the motor vehicles including one motor bike and tractor is the subject matter of the entire suit. Without going into the details of the Plaintiff/Respondent's suit as well as that of the Defendant/Respondent, it suffices to say that, the Plaintiff/Respondent contends that though the Defendant/Applicant is the registered owner of the motor vehicles, he is not the beneficial owner thereof; that he held them as a trustee of a Community Based Organization (CBO), an education a Programs Manager development group called SAMBURU EMPOWERMENT through EDUCATION

and DEVELOPMENT (SEED SAMBURU) of which the Defendant/Applicant was the Programs Manager at the time the motor vehicles were acquired. This is a matter which will only be investigated and determined by the trial judge, and I make no more comments on it.

In the Application of 11.02.2013, the Defendant/Applicant claimed that the Plaintiff lacks locus standi to institute a suit against the Defendant/Applicant, on behalf of SEED SAMBURU.

There are two answers to this contention. **Firstly** since the promulgation of the Constitution of Kenya 2010, Article 159 thereof requires all courts to determine disputes in accordance with substantial justice, without undue regard to technicalities - in **ABDALLA ALI BAJABER VS. MANGALE DZOMBO NGOKA ANOTHER [2012] eKLR** Hon. Murithi J held-

"... I take the view that the defects in the Defendant's case may be overlooked in accordance with Article 159 principle of substantial justice without undue regard to technicalities of procedure."

There are, in my view, no technicalities of procedure in this case. There is no challenge that SEED SAMBURU exists in the manner of its registration by the relevant Ministry. There is also no challenge that **ISMAIL ABDI** and **ANNIE KANAI** are its current Chairman and Secretary. As an unincorporated body or corporation, they have locus standi to institute suit in terms of Order 30 rule 9 of the Civil Procedure Rules 2010, or Section 357 of the Companies Act, (Cap. 486, Laws of Kenya) as an unincorporated body. In the circumstances therefore, the contention that the Plaintiff/Respondent has no locus standi has no basis in law.

Having failed on the two issues, on review and locus standi, I find and hold that the Applicant's two applications dated respectively 11.02.2013 and 22.04.2013 have no merit at all, and both are dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered at Nakuru this 7th day of February, 2014

M J ANYARA EMUKULE

JUDGE