



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 195 OF 2014

JACKSON MUTUA KAVILA.....PLAINTIFF/APPLICANT

VERSUS

THE GOVERNMENT OF MAKUENI COUNTY.....DEFENDANT/RESPONDENT

AND

RAEL MUTHOKA

SHADRACK MULANGA.....INTERESTED PARTIES

RULING

1. This Ruling is in respect to the Applications dated 2nd December, 2014, 25th February, 2015, 27th February, 2015 and the Notice of Preliminary Objection dated 11th May, 2015.

2. In the Application dated 2nd December, 2014 filed by the Plaintiff, the Plaintiff is seeking for the following orders:

a. That the Defendant's agents and or servants or howsoever be restrained from interfering with the Plaintiff's equipment and or the Plaintiff's project of harvesting, transporting and supplying sand to the China Road and Bridge Corporation from the NEMA approved sites within Makueni County pending the hearing and determination of the suit herein.

b. The Defendant be compelled to accept cess/revenue for sand harvested and transported by the Plaintiff as prescribed by the Makueni County Finance Act 2013 until another law is enacted.

c. That the costs of this Application be provided for.

3. The Application is premised on the grounds that the Plaintiff has been contracted by the China Road and Bridge Corporation to supply sand for the construction of the Standard Gauge Railway line; that the Plaintiff has entered into agreements with communities for the supply of the same and that the Plaintiff has obtained the requisite consents and approvals from the National Environment and Management Authority.

4. The Plaintiff's complaint is that the Defendant's agents have without just cause prevented the Plaintiff from harvesting sand in the County; that the Defendant has declined to receive cess as per the Makueni County Finance Act, 2013 and that the Defendant is demanding illegal levies.

5. In response to the Application, the Defendant's County Secretary deponed that there exists an executive order that was issued vide Gazette Notice No. 152 of 9th January, 2015 regulating sand harvesting within the County; that the executive order was informed by the wanton and unregulated harvesting of sand within the County and that the process of formulating a substantive legislation to regulate sand harvesting has begun.

6. In the Application dated 25th February, 2015, the Plaintiff sought for the following orders:

a. That the Defendant/Respondent be ordered to deposit a sum of Kshs. 20,000,000 (twenty million Kenya shillings) into this Honourable Court within a specified period as security for the damage and loss caused to the Plaintiff/Applicant by the Defendant/Respondent's breach of this Honourable Court's order dated 2nd December, 2014 and extended on 9th February, 2015.

b. That the Interested Parties hereinabove named, Rael Muthoka and Shadrack Mulanga, be arrested and detained in prison for a period of six (6) months or such other period as this Honourable Court may deem fit to order for disobeying this Honourable Court's orders dated 2nd December, 2014 and extended on 9th February, 2015.

c. That costs of this Application be borne by the Defendant/Respondent.

d. That this Honourable Court do make any other and/or further order as it may deem fit and just.

7. The said Application is based on the grounds that even after serving the Defendant with the orders of 2nd December, 2014, the Defendant's employees impounded the Plaintiff's lorries used to transport sand from the approved sites; that the Defendant and the Interested Parties made it clear that they will not obey the orders of the court and that the Defendant has denied him access to the approved sand harvesting sites.

8. The Plaintiff deponed that the Defendant should be ordered to deposit Kshs. 20,000,000 in court as security for the loss and damage that he has suffered and that the 1st and 2nd Interested Parties should be arrested and detained in prison for a period of six (6) months for disobeying the orders of the court.

9. In response to the Application, the Defendant's County Secretary deponed that the orders that were served on the Respondent were too wide in nature and that the Defendant took advantage of the same by bringing a fleet of vehicles which the Defendant was unable to ascertain if they belonged to the Plaintiff; that the Defendant had to file the Application dated 27th February, 2015 to vary the said orders and that the Defendant purged the contempt by releasing the two vehicles to the Plaintiff.

10. While the two Applications were pending, the Defendant filed an Application dated 27th February, 2015 in which it sought to discharge, vary or set aside the orders of the court of 11th December, 2014, and also to be allowed to file the Defence out of time.

11. In her submissions, the Plaintiff's advocate submitted that under Article 62(1) (1) of the Constitution, "public land" includes rivers; that all rivers within Makueni County are vested in the national government and that the National Environment Management Authority (NEMA) is the one mandated to supervise and co-ordinate all matters relating to the environment.

12. Counsel submitted that by a letter dated 19th November, 2014, the Director of National Environment Management Authority (NEMA) in charge of Makueni County gave the Plaintiff a written authority to harvest sand from Syethe and Nguumo Rivers in Makueni County for the construction of the SGR.

13. The Plaintiff's advocate submitted that any executive order that is given by the governor which is inconsistent with the Constitution is null and void to the extent of the inconsistency and that the Defendant does not have locus to interfere with, or bar the Plaintiff from harvesting and transporting sand from the National Environment Management Authority (NEMA) approved sites.

14. On the issue of the Application dated 25th February, 2015, counsel submitted that in breach of the injunctive orders, the Defendant impounded the Plaintiff's two lorries which were being used to transport the sand.

15. The Defendant's counsel submitted that the Constitution created two levels of government and that the Defendant is a government for all intents and purposes; that Section 16(1) of the Government Proceedings Act applies to the Defendant and that the orders of injunction sought against the County Government of Makueni cannot issue.

16. On the issue of the temporary injunctive orders that the court granted, counsel submitted that those orders are detrimental to the Defendant; that under Article 69(1) of the Constitution as read together with Schedule 4 and Sections 30 and 31 of the County Governments Act, it is the County Government which has the mandate of ensuring the equitable management and use of natural resources within the County and that the Defendant is using the temporary orders to cause massive degradation of the environment.

17. The Defendant's counsel submitted that there has been a change of circumstances following the enactment of the Makueni County Sand Conservation and Utilization Act, 2015.

18. The Defendant's advocate has submitted that they were only aware of the Summons to Enter Appearance on 19th January, 2015 when they opened their office after the Christmas break and that no prejudice will be suffered if they are allowed to file their Defence out of time.

19. On the issue of whether the alleged contemnors should be committed to civil jail, counsel submitted that the alleged contemnors were not parties to the suit; that it is not clear from the order of the court the identity of the Plaintiff's vehicles and that there has been no contempt on the part of the Defendant or the Interested Parties.

20. The Plaintiff is seeking for an order restraining the Defendant from interfering with its equipment or its project of harvesting, transporting and supplying sand to the China Road and Bridge Corporation from the National Environment Management Authority (NEMA) approved sites within Makueni County.

21. According to the Plaintiff's advocate, the mandate of approving sand harvesting lies with the national government and the National Environment Management Authority (NEMA) but not the Defendant.

22. Article 69(1) of the Constitution mandates the State to ensure sustainable exploitation, utilization, management and conservation of the

environment and natural resources, and ensure the equitable sharing of the accruing benefits.

23. The Fourth Schedule of the Constitution has distributed functions of conserving and managing the environment and natural resources between the national and county government. One of the functions of the national government is the protection of the environment and natural resources with a view of establishing a durable and sustainable system of development. However, the Fourth Schedule of the Constitution, and Section 9 of Part 2, provides that it is the function of the county government to implement specific national government policies on natural resources and environmental conservation.

24. The reading of the Constitution therefore shows that it is the responsibility of both the national and county government to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. Indeed, under Article 70(1) of the Constitution, any person who alleges that a right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed or threatened can apply to a court for redress, and the court may make an order to prevent, stop or discontinue any act that is harmful to the environment.

25. It therefore does not matter that rivers and the natural resources therein are vested in the national government. As long as any activity that is geared towards degrading the environment, like uncontrolled harvesting of sand, occurs, any person can move the court to have such activities stopped. In the circumstances, the Respondent, just like any other person, can seek for an order of the court stopping the Defendant from harvesting sand until an Environmental Impact Assessment has been undertaken pursuant to the provisions of the Environmental Management and Co-ordination Act (EMCA).

26. Indeed, under Section 42 of the Environmental Management and Co-ordination Act (EMCA), no person is allowed, without the prior written approval of the National Environment Management Authority (NEMA) to excavate, drill, tunnel or disturb a river, lake, sea or wetland. Excavation of sand is a disturbance of a river and river bed. Although the Plaintiff has deponed that he has a licence to harvest sand from what he calls "*NEMA approved sites within Makueni*", he did not exhibit any licence from the National Environment Management Authority (NEMA) or an Environmental Impact Assessment (EIA) Report as required by law.

27. In the circumstances, the order of injunction as prayed in the Notice of Motion dated 2nd December, 2014 cannot be granted because the Plaintiff has not established a prima facie case with chances of success.

28. In the Application dated 25th February, 2015, the Plaintiff wants the Defendant to deposit security for damages for Kshs. 20,000,000 and for the Defendant to be committed to jail for disobeying the order of the court. According to the Plaintiff, the Defendant impounded its nineteen (19) lorries which were being used to ferry sand.

29. Having already dismissed the Plaintiff's Application for injunction, the issue of the Defendant depositing money as security for the damage and loss that he is likely to incur does not arise. Indeed, that is a prayer that the Plaintiff can only pursue in the main suit and not at an interlocutory stage.

30. There is no evidence before me to show that the trucks that were impounded by the Defendant as alleged by the Plaintiff belonged to the Plaintiff. Indeed, in the absence of evidence to show that the Plaintiff supplied to the Defendant the list of its vehicles after the order of the court, this court cannot find that the Defendant is in contempt of the order of 2nd December, 2014. In the circumstances, the Application dated 25th February, 2015 is dismissed. In the Application dated 27th February, 2015, the Defendant is seeking for leave to file a Defence out of time. Considering that the Defendant's advocate has admitted that the failure to enter appearance and file a Defence was an inadvertent omission and in view of the fact that the Application was filed within a reasonable time, I shall allow the Defendant to file its Defence out of time. Indeed, the filing of the Defence out of time by the Defendant will not be inconvenient or prejudice the Plaintiff in any way because no evidence has been taken.

31. In the circumstances, the Applications dated 2nd December, 2014 and 25th February, 2015 are dismissed with no order as to costs and the Application dated 27th February, 2015 is allowed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE