



NO.19/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT ELC CASE NO.91 OF 2014

GREEN PLAN KENYA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

THE GOVERNMENT OF MAKUENI COUNTYDEFENDANT/RESPONDENT

RULING

1. The Motion dated 23.9.2014 came for inter partes hearing on 22.10.2014 for interim injunction in terms of prayer No.3 and 4 as prayers No. 1 and 2 had been dispensed with.
2. The application is based on the grounds a-e on the face of the Motion and it is supported by the affidavit of Maluki Musembi Ndeti sworn on 23.9.2014 and annexures thereto. The application is based on order 40 Rule 1 (a) and 2 and order 51 Rule (1) Civil Procedure Rules, Section 1A, 1B and 3A Civil Procedure Act. The application is opposed by the replying Affidavit of Daniel Mutia and supplementary Affidavit sworn on 14.10.2014.

THE APPLICANT'S CASE

3. The Applicant via its director depones that, the plaintiff entered into an agreement with China Road and Bridges Corporation to supply sand for the purposes of construction of Standard Gauge Railway line.
4. The Applicant liaised with the communities of various sand dams who agreed that the sand could be reduced to a certain level vide annexures MMN1 copies of agreement with various self help groups. The Applicant applied and obtained consent and approval of NEMA attached as MMN2.
5. The Defendant declined to accept cess payable to it as provided by the Makueni County Finance Bill 2013 and instead demanded illegal levies not authorized by the law. The Applicant attaches copy of the Finance Bill above MMN3.
6. On 20.9.2014 the Respondent's agents named assaulted driver at Matunga Sand dam and demanded that no sand would be removed otherwise they confiscate all company equipment.

7. Due to the foregoing incident the Applicant project of harvesting and supplying sand stalled thus Applicant incurring losses amounting to KShs.185,000/- daily in terms of daily rentals paid with regard to the machinery, hiring security, labour, accommodation inter alia. Thus the Applicant seeks orders herein;

THE DEFENDANT'S CASE

8. The defendant via David Mutua depones that the Defendant suspended the sand harvesting and sale of sand for commercial purposes in her jurisdiction following an executive order issued by the County Governor.
9. Thereafter a Task Force was commissioned by the Defendant which recommended the suspension continues until a sustained legal framework is put in place to govern the process. The executive order and Task force report are attached as DM1 and 2. The Defendant further states that, since suspension, no licences have been issued by the Defendant to harvest sand within her jurisdiction.
10. The Defendant complains that the plaintiff trucks are always overloaded and thus destroy roads, thus the Defendant incurring huge expenses in their maintenance. The Defendant further depones that the sand is not owned by individual members of society but is a natural and environmental resource for the entire community.
11. AND thus the plaintiff cannot therefore claim to enter into individual contracts to exploit this resource at the expense of the entire community. The Defendant further avers that the plaintiff has no NEMA license to harvest sand within the county areas mentioned in the order sought and within Makueni County.
12. The Defendant reiterates that the Plaintiff has not obtained the necessary approvals from the County Government herein to carry out the exercise and hence its actions are illegal.
13. The Respondent avers that the Applicant's action pose a serious environmental degradation threat through soil erosion and pollution that cannot be compensated by an award of damages.
14. In supplementary affidavit the Respondent avers that, the alleged contracts by the plaintiff should have been executed after it obtained all necessary consents to exploit the natural resources of the defendant. The Respondent reiterates that the executive order by the Governor was published on notice boards of the Defendant, and via radio and same order cannot be challenged in this court save in the Constitutional court.
15. The Respondent avers that the plaintiff is the only beneficiary of the agreement with China Roads and Bridges Corporation not people of Makueni.
16. The Respondent further states that the Task Force did not recommend the lifting of the ban but a permanent solution via well-structured organization and legislation to regulate sand harvesting since it has occasioned environmental degradation and negative social impact in the county. The Respondent prays that the application be dismissed with costs.

SUBMISSIONS

17. The Applicant submits that public land in county belongs to the people and the county is custodian over it as it holds the land in trust of the people and NLC administers the same.
18. Under Article 60(1) of the Constitution of Kenya that land has to be held used and managed in a manner that is equitable, efficient, productive and sustainable.
19. The Applicant avers that any administration and proclamations on public land must be preceded by public participation and any protection and conservation of the environment is a partnership of National and County governments and the county residents vide Article 60(1) (e) Constitution of Kenya.
20. The Applicant submits that the executive order is not lawful because though purported to have

been issued under section 30 and 31 County Government Act and Article 69(1) Constitution of Kenya, same was never gazetted in County Gazette as is required by Section 30 (2) (i) County Government Act. And thus the same has no force of law.

21. The Applicant submits that the Governor appointed a task force to conduct a research on sustainable harvesting of sand and the way forward towards the achievement of protection of the sand source. The Task Force on page 3 of its report noted that NEMA formulated sand harvesting guidelines in 2007 to regulate business of sand harvesting but same have been largely unenforced due to the lack of political will necessary to support the regulations.
22. On page roman x of the same Task Force report the Task Force recommended ban be lifted with new guidelines for enforcement and revenue collection before specific legislation is put in place. The Applicant submits further that sand in the county is owned by the entire county community as a natural resource. The sand dams have been constructed by the county's residents as joint venture to further their economic status. It is in aforesaid situation and circumstances the Applicant engages the county residents and thus creating employment opportunities for the local residents and rightfully compensate them for the sand harvesting.
23. On allegation of environmental degradation and resultant negative impact on road infrastructure inter alia, the Applicant submits that same allegations are unfounded as no evidence not even photographs have been furnished to back the same. Instead the Applicant submits it has improved infrastructure to roads leading to various harvesting sites.
24. The Applicant further submits that NEMA in their letter MMN2 recognizes the Applicant work as tied to a project of National priority and thus authorized the mobilization of resources, processes and procedures for implementation of the said projects. The Applicant submits that Nema did not condemn Applicant's action on sand harvesting.
25. The Applicant concludes by submitting and demonstrating how the principles of **GIELLA VS. CASSMAN BROWN LTD** applies to their case herein.
26. The Applicant submits that on materials in the pleadings and affidavit, a prima facie case has been proved and/or established.
27. On harm to be inflicted if no orders are granted, the Applicant submits that financially and in business repute the Applicant will suffer irreparable harm in that it will not honour its contract with SGR contractors. It reiterates that the financial implication is unfathomable as alternative source of sand would be Kajiado and Machakos counties with gigantic financial implications.
28. On balance of convenience, the Applicant submits that it is its side which will suffer most inconveniences in that due to aforesaid financial and economic repute implications. The Respondent worry will be addressed by the Applicant participating in repair of roads and/or financial compensation. The Applicant prays for the orders to be confirmed.

RESPONDENT'S SUBMISSIONS

29. The Respondent submits that the plaintiff contract with SGR constructors is for 1 ton of sand at a price of KShs.750 and the prayers in plaint is for damages and/or loss of KShs.185,000/- per day which Applicant sustained and is likely to suffer if orders are not granted. Thus the Respondent argues, that they are quantifiable.
30. The Respondent also question the allegation that the other individuals contracted by Applicant on sand harvest venture represent the community. Respondent submits further that NEMA has not licensed harvest of sand workers nor has the Respondent done so.
31. The Applicant submits that the ban vide Executive orders of 26.4.2013 was made in the best interest of the community at large. Same ban has not been challenged in any court of Law. Respondent confirm that the sand in the county is owned by the community not the individual. Respondent submits that the Applicant action has destroyed road infrastructure and is a threat to environment safety.

32. The Respondent concedes that Articles 69 and 70 of Constitution of Kenya state that State and other Organizations are obliged to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and eliminate the process and activities that are likely to endanger the environment. The Respondent submits that under part (2) Article 10 of the 4th schedule of the Constitution of Kenya the devolved functions of County Government is the implementation of specific policies on natural resources and environmental conservation. Further Article 62 (2) of the Constitution, public land like the one herein, vests in and is held by a County Government, in trust for the people resident in the county.
33. The Respondent relies on the principles of grant of temporary injunction and cites the case of **GIELLA VS. CASSMAN BROWN CO. LTD** and other authorities which have endorsed it to wit:-

E.A. INDUSTRIES VS. TRUFOODS, HELEN CHEPKUPEI SIGEI VS. JULIANA CHEPKOROS, ABEL SALIM AND OTHERS VS. OKONGO AND OTHERS.

AND submits that plaintiff cannot obtain the orders sought because it has not met the thresh hold of the above principles.

34. On prima facie case, the Respondent relies on the case of **MRAO VS. FIRST AMERICAN BANK** AND submits that the case herein fails because:

- No prove the ban of sand harvesting is illegal.
- No authority cited to show that sand can only be delivered by Defendant resources.
- The Applicant has not obtained authority by NEMA to carry out sand harvest.
- The Applicant has not demonstrated that the ban has breached its rights.
- The Applicant has not shown how the exploitation of natural resources will benefit the entire community.
- The Applicant has not shown how the Respondent has violated Article 42 of Constitution which mandates Respondent to protect environment.
- Applicant has not shown how the signatures to the contract herein represent the community.

- The Applicant has not challenged the ban in court.
- The financial Bill of 2013 deals with local consumption not for commercial purposes.

35. On irreparable harm which cannot be compensated, the Respondent submits that;

- the damages can be ascertained and can be compensated.
- Applicant has not shown sand can only be available in Makueni County.
- The infrastructure damage and environment threat will occasion irreparable harm to environmental situation of Respondent County.

36. On balance of convenience principles, the Applicant will not be inconvenienced but instead the

balance tilts in Respondent's favour due to the negative impact on environment which may arise from sand harvesting.

37. The Respondent sought for dismissal of Application and discharge of orders.

ISSUES FOR DETERMINATION

1. Whether the ban of commercial sand harvesting by order of 26.4.13 is lawful"

2. Whether the Applicant has established that the case herein meets the thresh hold of principles of grant of interim orders in line with GIELLA VS. CASSMAN BROWN CASE"

3. What is the order as to costs"

ANALYSIS

38. On 26.4.2013 the Governor, Makueni County issued an Executive order No.1/013 which in effect 'SUSPENDED INDEFINETELY HARVESTING OF SAND FOR COMMERCIAL PURPOSES WITHIN MAKUENI COUNTY' until a substantive legislation is passed to regulate the process.

39. The said order has not been published in the county gazette in line with Section 30 (2) (i) County Government Act which states that

"S.30(2) (i) Subject to the Constitution, the Governor shall sign and cause to be published in the county gazette, notice of all important formal decisions made by the Governor or by executive committee."

40. The same order mentioned that a Task Force had already been constituted to investigate the issue and come up with recommendation on the way forward.

41. Pursuant to the aforesaid order, the Respondent agents/employees effected the contents of the order by way of stopping the harvesting of the sand by the Applicant and its agents/employees in the designated sites subject herein.

42. This prompted the Applicant to lodge the suit herein together with the notice of motion seeking interim injunction orders against Respondent pending hearing and determination of the suit herein. The court certified matter urgent and granted interim relief.

43. The matter came up for interpartes hearing on 22.10.014. The Applicant contends that if the orders are not granted it will not only suffer loss of KShs.185,000/- per day but also economic repute.

44. On the other hand the Respondent submits that the commercial sand harvesting is banned and the ban has not been challenged, and in any event the environmental damage is enormous and supersedes the Plaintiff/Applicant financial loss and economic repute. The indefinite ban by the governor seem to have covered the entire county but not specifically the 4 sites subject of the suit herein.

45. The Task force constituted made recommendations on page 26 of the report (Respondent's DM2) to the effect that "COUNTY GOVERNMENT SHOULD BE ABLE TO LIFT BAN ON SAND HARVESTING WITH NEW GUIDELINES FOR ENVIRONMENT AND REVENUE COLLECTION BEFORE SPECIFIC LEGISLATION IS PUT IN PLACE."

46. The aforesaid recommendation was made despite the Task Force conclusion that sand harvesting has caused environmental degradation and negative social impacts noted in the report.

47. Since 26.6.013 when the ban was made and Task Force report made, the Respondent does not say what has been done to effect the recommendations made. Though the report is undated or

signed and the Applicant did not object to the same, same is held to be genuine for the purposes of the application herein.

48. The Plaintiff/Applicant claim is not a representative suit but a pure private contract between it and the China Roads and Bridges Corporation (K) Ltd to supply sand. To fulfill the aforesaid contractual obligation, the Plaintiff has entered into other contracts with Daranjani Seed Bank SHG and Malaika sand dam SHG for them to sell sand to it under agreements dated 5th and 8th September, 2014 exhibited in the affidavit of Maluki Musembi Ndeti sworn on 23.9.014.
49. It is in the process of procuring the sand in the above contracted circumstances that the Applicant alleges that the Defendant disrupted and obstructed the same in apparent enforcement of the ban by the Respondent Governor. This disruption and obstruction caused the Applicant to fail to honour his contract of supply of sand as contracted and thus suffering huge losses pleaded.
50. It is the Applicant's averment that the aforesaid interference is unlawful and unjustified and especially in view of the unlawfulness of the ban and the fact that County Finance Bill 2013 provided for harvesting sands.
51. The Defendant justifies the ban on the alleged degradation of the environment and the negative impact arising thereof. The ban is based on Article 69(1) which is to the effect, specifically Article 69(1) (a), that:

"Article 69 (1) (a): the State shall ensure sustainable exploitation utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits."

52. One of the functions of the County Government vide 4th schedule section 10 of the Constitution is;

Implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation. Article 71 and 185 (4) of the Constitution have been cited by the respondent as requiring approval by both National and County Assemblies for agreement to exploit natural resources.

53. The above provisions of Articles 71 and 184 are not applicable in case herein as there is no issue of grant of right or concession to exploit natural resources between the Plaintiff and the Defendant nor does the situation herein involve approval of policies and plans on management and exploitation of the County resources.
54. The ban by the Defendant via the executive order under Section 30 and 31 on the face of it fails to meet any quality of legal rule in absence of gazettment prescribed to enable the Defendant to employ the same as tool to impede the applicant fulfilling his contractual obligation by sourcing sand in the cited sites.
55. Section 27 of Cap 2 is to the effect that, **"all subsidiary legislation shall unless is otherwise expressly provided in a written Law, be prescribed in the gazette and shall come into operation on the day of publication"**. The publication in the gazette having not been proved herein, the ban legality remains questionable as its operation seems not to have taken effect in terms of section 27 of Cap.2.
56. The Defendant is left with no legal basis to justify the ban in the circumstances herein. It is noted that the Respondent has not invoked the provisions of Article 70 of the Constitution of Kenya to enforce Environmental rights – but instead employed the mode of use of executive order to purportedly enforce its function of protection of environment within its jurisdiction.
57. In view of the foregoing, the court finds that the Applicant has established a prima facie case with probability of success in line with authority of **MRAO VS. AMERICAN BANK** which defines prima

facie case in the following words:-

“prima facie case must show evidence which shows infringement of right, and the probability of success of Applicant's case upon trial”.

58. The other principle of **GIELLA VS. CASSMAN BROWN AUTHORITY** is that the Applicant must show that it will suffer harm/injury which may not be compensated by award of damages in event orders are not granted. The Respondent argues that since the Plaintiff pleads ascertained amount KShs.185,000/- loss per day, same can be paid in event of Plaintiff winning the case.
59. **IN PRINCIPLES OF INJUNCTION treatise by R kuloba**

At page 54, the author states that, on inadequacy of damages, that although may be assessable or might be adequate, the chances of getting them are remote.

In our instant case there are two elements of harm, the damages pleaded specifically and economic repute.

60. The Defendant does not demonstrate how and to what extent it can pay such a claim if the suit is to take years to conclude while the Applicant is grounded in the operations or how economic repute can be reparable. The Applicant has proved on balance of probabilities that it would suffer damages which Respondent may not be able to pay in event of success of the suit.
61. On balance of convenience, the court finds that there are 2 elements to be considered here. (i) The fact that grounding the Applicants operations in supply of sand to the SGR Contractor, and the impact on environment due to unregulated sand harvesting in the Defendant's county. On this aspect, I am persuaded to look at the Task Force report which comprised inter alia NEMA representative, sand dealers, County Environmental officer, transporter, lawyer, sand planner, inter alia and had inputs from Hon. Members of National Assembly and Hon. MCAs.
62. The report arrived at a verdict that ban be lifted with new guidelines. It is thus the court's holding that the application has merit but with qualification and thus makes the following orders.
1. The orders of injunction are granted to enable the Applicant to continue with its sand business as contracted so that the Respondent does not interfere with Applicant Equipment, sand harvesting from Malaika, Kwa Kaunda, Matinga and Kwa Nthii sand dams.
 2. The Respondent is at liberty to craft new guidelines in terms of the Task Force report to regulate sand harvesting and business in Defendant County.
 3. The Applicant to pay and continue to pay all requisite and legal dues to the Defendant for the sand business undertaken in Defendant County.
 4. Costs in the cause.
 5. There be liberty to apply.

Dated and Delivered at Machakos this 14th day of November, 2014.

CHARLES KARIUKI

JUDGE



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