



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC CRIMINAL NO. 3 OF 2019

ALEX MURITHI KIAMBI.....APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

FORESTER MUTINDWA WA MBOGORI.....2ND RESPONDENT

RULING

1. **ALEX MURITHI** (the applicant herein) has moved this court vide a Misc. Criminal Application by way of Notice of Motion dated 6th February, 2019 which motion is brought under **Article 40, 43, 47 and 48** of the Constitution of Kenya 2010 and seeks the following relief namely:-

- a) That the application herein be heard on priority basis. (spent)
- b) That this honourable court be pleased to order the Forester Mutindwa Wa Mbogori who is named a 2nd Respondent in this application to release motor vehicle No. KCR 023 G Isuzu Lorry.
- c) That this honourable court do make any other orders that may meet the ends of justice.
- d) Costs be provided for.

2. This application is premised on 2 listed grounds namely:-

- (i) The detention of the applicant's motor vehicle by the Respondents is illegal and an abuse of the constitutional rights.*
- (ii) That the Applicant is suffering loss and damage due to the illegal act by the Respondent.*

3. In the Supporting Affidavit, the applicant has deposed that he is the owner of motor vehicle Registration No. KCR 023G the lorry that now the subject of this application.

4. The Applicant asserts that on 31st January, 2019 his driver one Dennis Munene was hired by Kennedy Bundi Njagi to pick timber from his home at Chogoria and that there was a movement permit for the same. He has exhibited the movement permit as exhibit "A.M 1".

5. The applicant further states that when the lorry was in the process of being loaded with timber, officers from Mutindwa Wa Mbogori Forest bounced on them and took away the lorry keys and drove it to the forest station.

6. The Applicant has expressed surprise that neither the driver nor the owner of the timber was arrested. He further contends that he went to see the forest office for release of his lorry but that the demand was met with refusal and reluctance.

7. The Applicants contends that detention of his lorry beyond 24 hours is unconstitutional and should be released forthwith. At the hearing of this motion counsel for the applicant asserted that the Respondent ought to have notified the court about the holding of his lorry as provided under **Section 62 (1) (d)** of the **Forest Conservation Management Act**.

8. The Respondents have opposed this application vide a Replying Affidavit of one Chief Inspector Richard K. Ngotho sworn on 7th February, 2019. The deponent states that he is the OCS Chogoria Police Station where a case involving motor vehicle Registration KCR 023 G was reported.

9. The OCS has further stated that on 31st January, 2019 at around 8 am he received information that a lorry had been intercepted by Forest Rangers on Parol who discovered that the lorry was illegally carrying 12 beams of Meru Oak and 17 beams of Camphor which are endangered and protected species valued at Kshs.300,000/-.

10. The OCS has asserted that when the lorry driver was stopped, he left the lorry engine running and fled with a passenger in the lorry forcing the rangers to have the lorry photographed at the scene before driving it to police station. He insists that the photographs are currently being processed by the scenes of crime personnel. He also asserts that the driver and the owner of the lorry have not been traced.

11. The Respondent contends that the incident was booked at Chogoria Police Station vide **OB No. 19/31/1/19** and that investigations are currently underway as they continue pursuing the suspects. In their view the Motor vehicle Registration No. KCR 023G is an exhibit in the intended prosecution of suspects who are still at large and that the lorry is subject to forfeiture upon successful prosecution under **Section 68(1)(c) of the Forest Conservation & Management Act 2012**. They have denied the applicant's contention that he has been to police station because according to them the owner of the lorry is required at the police station for interrogation.

12. The Respondent have relied on the case of *Elijah Nyakebondo Onsongo - vs- Republic [2017] eKLR* to oppose the release of the lorry. In that case the court set aside a lower court's decision to release a lorry seized carrying Cedar timber on the basis that the lorry had not been produced as an exhibit in court as the driver had run away and had not been traced. The court further observed that there was no permit to transport the Cedar.

13. This court has considered this application and the response made by the State. The applicant herein is seeking for the release of his lorry Registration No. KCR 023 G on the ground the detention of the same is illegal and that he is suffering loss and damage due to the seizure of the lorry. He further claimed that the detention of the lorry infringes on his Constitutional rights which are protected by law.

14. The applicant however has not moved this court or any other court for that matter for declarations that the applicant's actions were unlawful and /or unconstitutional. The Miscellaneous Cause filed in my view is not the right forum to substantially canvass and interrogate about whether or not there was infringements of constitutional rights, and whether the Forest Rangers acted within powers or arbitrarily and whether or not as a result of Respondents' actions, the applicant has suffered loss and damage. The proper forum in my view is either through a Constitutional Petition or a Judicial Review challenging the actions of the Forest Officers or the police. That way issues can be canvassed well through oral hearing or by way of affidavits and submissions to enable the court make a substantive finding on whether the constitutional rights of the applicant have been violated or whether the police or Forest Rangers acted arbitrarily and illegally in seizing the motor vehicle Registration No.KCR 023G.

15. Secondly this court has noted that the applicant has failed to show any proof that he is the owner of the lorry Registration No. KCR 023 G. The lorry now is a subject of criminal investigations as alluded by the Respondents and in my view it will be premature to order that a potential exhibit be released to the owner (assuming ownership had been proved) before investigations are completed. That would jeopardize the investigations and hamper prosecution in the event that the Office of the Director of Public Prosecution decide that the lorry and the timber it was carrying need to be produced as exhibits to prove their case against any suspect that may be apprehended because this court has been told that the suspects are currently at large.

16. Thirdly I have looked at the purported movement permit of forest produce tendered by the applicant and it is apparent that the holder of the permit is one Ezekiel Muriuki. Now Ezekiel Muriuki is not a party in this application and has not been mentioned anywhere by the applicant. The applicant has mentioned one Kennedy Bundi Njagi as the owner of the timber that was seized. One Dennis Munene is mentioned as the driver and the applicant himself states that he is Alex Murithi Kiambi. This court is unable to find the nexus between the movement permit, the lorry Registration No. KCR 023 G and what it was carrying when it was intercepted. Furthermore I note from the movement permit and other Supporting documents from the Kenya Forest Service that the permit issued was in respect to Grevillea, Blue gum and Acrocarpus timber. The Respondents have stated on oath that the timber seized is the endangered species and protected. If it is true that the timber are Camphor and Meru Oak as stated by the Respondent, then it is obvious that the applicant or any one for that matter did not possess a permit to transport them.

17. This court further finds that the applicant should have brought the holder of the permit or have him swear an affidavit and state whether what was seized by the Forest Rangers belonged to him. I have also not been told why the driver of the lorry has not sworn an affidavit unless of course it is true that he fled upon seeing the Forest Rangers. If that is the case why did he get afraid if he was not guilty of any offence? Why did Kennedy Bundi Njagi also fail to swear an affidavit to deny the allegations that they were intercepted coming from the forest area on 31st January 2019 at 5 am? In my view the applicant and the persons he has named have not come out clearly on what actually took place on 31st January, 2019.

18. The applicant has faulted the Respondents for not complying with the provisions of **Section 62 (1) (d) of the Forest Conservation Management Act, 2016**. The provisions states that the chief conservator of Forests or any authorized officer may,

(a) "search any vehicle or vessel and seize and detain any forest produce in respect of which there is reason to believe that an offence has been committed together with any tools, equipments, vessels, vehicles, or livestock used in the commission of the offence:-

provided that the officer seizing such property shall forthwith report the seizure to the court of competent jurisdiction having jurisdiction over the area where the offence takes place."

18. This court finds that the issue of whether the Forester Mutwindwa Wa Mbogori complied with the above provision cannot be determined in this application for two reasons:-

(i) This court was shown a Notice from the bar by Mr. Momanyi from Office of the Director of Public Prosecution indicating that there was a Notice written to the Chief Magistrate's Court. The applicant in his application had not specifically cited the infringement of **Section 62(1)(d)** of the cited Act in his application and so while the applicant rightly protested at the production of the letter by the Forester from the bar, he was also found at fault for having ambushed the Respondents.

(ii) This court takes the view that even if the Forester infringed on the cited provisions of the law, remedy does not lie in this application or more specifically on the release of seized motor vehicle because that would be tantamount to using one wrong to correct another. In effect the applicant's position is that because the Forester never issued a Notice of the seizure of the lorry to court, the same should be released notwithstanding the fact that the same may have been used to commit a crime/ or an offence or that the same is potentially an exhibit. That in my view is not tenable and cannot be sustained.

19. The applicant in my view still has his rights protected if he can prove:-

(i) That the lorry is his and is not an exhibit.

(ii) That the detention was unlawful illegal or unprocedural.

(iii) That the timber it was found with is not the Camphor and Meru Oak or any Forest produce without movement permit.

In that event the applicant can still sue for damages if he feels that his rights have been violated in any way.

In conclusion this court finds that the application dated 6th February, 2019 is incompetent and lacks in merit for the aforesaid reasons. The same is disallowed.

Dated, signed and delivered at Chuka this 20th day of February, 2019.

R.K. LIMO

JUDGE

20/2/2019

Ruling dated signed and delivered in the presence of Applicant in person and Momanyi for Respondent.

R.K. LIMO

JUDGE

20/2/2019