



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

JUDICIAL REVIEW MISC.APPLICATION NO. 11 OF 2016

IN THE MATTER OF AN APPLICATION FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF ORDER 53 RULE 1

OF THE CIVIL PROCEDURE RULES

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE'S COURT....1ST RESPONDENT

THE KENYA FOREST SERVICE.....2ND RESPONDENT

THE OFFICER IN CHARGE OF

KABATI POLICE STATION.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

R U L I N G

1. Faulu Microfinance Limited, the Ex Parte Applicant filed a Notice of Motion pursuant to the provisions of **Article 23(f), 47 and 50** of the **Constitution of Kenya, Order LIII Rule 3(1)** of the **Civil Procedure Rules, Section 8 and 9** of the **Law Reform Act**, and all enabling provisions of the law seeking orders thus:

a. An order of Certiorari do issue quashing the decision of the Hon. Principal Magistrate at the Kitui Law Court in Criminal Case Number 904 of 2016, Republic vs. Luice Musyoka Munyoki forfeiting to the State, the Exparte Applicant's co-owned motor vehicle registration number KCG 258V, WU720R Hino Truck.

b. Costs of this application be provided for.

2. The application is premised on grounds set out in the statement of facts thus; That the order made by the 1st Respondent in **Criminal Case No. 904 of 2016 Republic vs. Luice Musyoka Munyoki** forfeiting motor-vehicle registration number **KCG 258V Hino Truck model WU720R** (subject motor-vehicle) violates the Ex Parte Applicant's rights of ownership being a joint registered owner of the said motor-vehicle by virtue of having financed its purchase through its Asset Finance Loan Facility. That it was not alerted of the Criminal Court proceedings that would have enabled it to defend its interest and that the loan facility is now in arrears.

3. The application is also supported by an affidavit verifying facts sworn by **Purity Raaria**, a Legal Manager of the Ex Parte Applicant who deponed that on **22nd February, 2016 Gladys Wambui Muchoki** approached it and they advanced her a facility to purchase a motor-vehicle to use in her business which she did.

4. That in **November, 2016** they got information regarding the motor-vehicle having been impounded on account of **Transporting Forest Produce without a Forest Permit** and are aware that the driver who was in control of the motor-vehicle was found guilty and an order made forfeiting the motor-vehicle to the Kenya Forest Service (2nd Respondent). That they were not represented in Court because they only learnt of the proceedings in **November, 2016**. That they will suffer irreparable damages.

5. That the 1st Respondent willfully neglected and/or refused to carry out her duties diligently and in accordance with the law by exceeding her jurisdiction by ordering forfeiture of the motor-vehicle without inquiring into the ownership and affording the owner an opportunity to be heard.

6. The 4th Respondent filed grounds of opposition on his behalf and that of the 1st and 2nd Respondent where he stated that the 1st Respondent had requisite jurisdiction to determine the matter and the Applicant had not demonstrated any case requiring issuance of an Order of Certiorari against the 1st, 3rd and 4th Respondents. That **Section 6** of the **Judicature Act** provides that no Judge or Magistrate acting judicially shall be liable to be sued in any Civil Court for an act done by him in discharge of his judicial duty. That Judicial Review cannot be used to curtail or stop statutory bodies or Public Officers from lawful exercise of their powers within their statutory mandate.

7. The application was canvassed by way of written submissions that this Court has taken into consideration.

8. At the outset it is important to consider the background of this matter. It is clearly stated by the Ex Parte Applicant that the subject motor-vehicle was impounded by the State and held in custody at the Kitui Police Station after contravention of law. The driver of the motor-vehicle was charged in Kitui Chief Magistrate's Court, **Criminal Case No. 904 of 2016** with the offence of **Transporting Forest Produce without a Forest Movement Permit** contrary to **Section 25(1)(a)** as read with **Section 2** of the **Forest Act No. 7 of 2005**. The Accused in the matter admitted the charge and was penalized accordingly. On the same date the learned Magistrate ordered thus:

“.....motor-vehicle retained at Kitui Police for the owner to show cause why it should not be forfeited within 14 days.”

9. The order was dated the 16th day of **September, 2016**. Consequent to the order, instead of appearing in the same matter as directed, **Gladys Wambui Muchoki** filed a **Miscellaneous Application No. 112 of 2016** on the 20th **September, 2016** where she sought orders that:

“The OCS Kitui be ordered to release motor-vehicle registration number KCG 258V to the owner the applicant herein.”

10. The application was based on grounds that the Accused had pleaded guilty and was sentenced. That the Applicant was suffering loss following the detention of the motor-vehicle but would avail it whenever required. In the affidavit in support of the application she stated *inter alia* that:

“I am the actual owner of the motor-vehicle registration number KCG 258V together with Faulu Microfinance Bank Limited who are my financiers.”

11. The learned Magistrate considered the application and reached a finding that the subject motor-vehicle be forfeited to the Kenya Forest Service. The order was to apply in **Criminal Case No. 904 of 2016**.

12. Aggrieved by the order of the learned Chief Magistrate, the Applicant (**Gladys Wambui Muchoki**) filed an Appeal dated 31st **October, 2016** that is pending hearing on 20th **February, 2018**.

13. The Ex Parte Applicant herein seeks an order to quash an order that is a subject of Appeal.

14. In considering whether or not to grant the order sought, I must remind myself that the remedy sought is discretionary. The **Halsbury's Laws of England 4th Edition** states thus:

“The remedies of quashing orders (formally known as orders of certiorari) are all discretionary. The court has a wide discretion whether to grant relief at all and if so what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile Similarly where public bodies are involved the court may allow contemporary decisions to take their course, considering the complaint and intervening if at all, later in retrospect by declaratory orders.”

15. In the case of **Republic vs. Director of Public Prosecution and 2 Others Exparte Francis Njakwe Maina and Another (2015) eKLR** the court stated that:

“Judicial Review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with legality of the decisions of bodies or persons whose decisions are susceptible to Judicial Review.”

16. I am alive to the fact that a party seeking the remedy of judicial review should be disputing the validity of the decision making process but not the quality or worthiness of the decision.

17. In the case of **Municipal Council of Mombasa vs. Republic and Umoja Consultants LTD Civil Appeal No. 185 of 2001** the Court of Appeal stated that:

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself. The Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was not sufficient evidence to support the decision.”

18. To succeed the Ex Parte Applicant must satisfy the principles that were stated in the case of **Pastoli vs. Kabale District Local Government Council and Others (2008) 2EA 300** that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

19. This is a case where the learned Chief Magistrate who was seized of the matter had jurisdiction to hear and determine it.

20. Section 55 of the Forest Act, 2005 provides thus:

“(1) Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the court may in addition to any other ruling order—

(a) that such person pay to the forest owner, by way of compensation, a sum equal to the determined value of the forest produce so damaged, injured or removed and where the value cannot be estimated, ten thousand shillings for each offence;

(b) if it is proved to the satisfaction of the court that the person so convicted is the agent or employee of another person, that other person to pay by way of compensation to the forest owner, the value of the forest produce, unless after hearing that other person, the court is satisfied that the offence was not due to his negligence or default;

(c) the forest produce be removed, and any vessels, vehicles, tools or implements used in the commission of the offence, be forfeited to the Service:

Provided that the value of the forest produce shall be either the commercial value of the forest produce or the cost of repairing the damage caused to biodiversity as a result of the activities complained of.

(2)”

21. Prior to exercising the discretion to forfeit the motor-vehicle as provided the learned Magistrate gave the owner of the motor-vehicle an opportunity of being heard prior to the order of forfeiture being made. The Ex Parte Applicant had knowledge of the existence of the case. The person it financed to purchase the motor-vehicle who was in possession of the motor-vehicle was heard. It can therefore not be stated with certainty that the decision made by the Court was irrational.

22. What should be questioned in this matter is the merit of the decision by the learned Magistrate which will be answered at the hearing of the Appeal.

23. In the premises the application lacks merit. It is dismissed with costs to be borne by the Ex Parte Applicant.

24. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of February, 2018.

L. N. MUTENDE

JUDGE