



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

MISC. APPLICATION (JR) NO. 2 OF 2016

AND

IN THE MATTER OF: AN APPLICATION BY PAMOJA NANIGHI FOREST

CONSERVATION AND USERS SOCIETY AND IBRAHIM

RAMADHAN SHORA FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW

AND

IN THE MATTER OF: SECTION 4(3) (b), 5 (2), 8 (C), 7 (2) (II)9, 11(1) OF FAIR

ADMINISTRATIVE ACT NO 4 OF 2015

AND

IN THE MATIER OF: THE SOCIETYACT CAP 108 LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLES 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 36, 46 AND 48 OF THE FOREST ACT 2005 LAWS OF KENYA.

AND

IN THE MATTER OF: A DECISION BY THE ECO-SYSTEM CONSERVATOR

TANA RIVER COUNTY MR. PETEK M. KIOKO TO REFUSE

AND DECLINE TO ISSUE A MOVEMENT OF CHARCOAL TO

PAMOJA NANIGHI FOREST CONSERVATION AND USERS SOCIETY.

IN THE MATTER OF: HOLA CRIMINAL CASE NO.207 OF 2015,

REPUBLIC VERSUS IBRAHM RAMADHAN SHORA

REPUBLIC

=VERSUS=

THE ECO-SYSTEM CONSERVATOR TANA RIVER COUNTY

(PETER M. KIOKO).....1ST RESPONDENT

THE CHIEF NANIGHI LOCATION.....2ND RESPONDENT

THE OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS HOL.....3RD RESPONDENT

THE SENIOR RESIDENT MAGISTRATE

HOLA LAW COURTS.....4TH RESPONDENT

AND

NANIGHI RIVERLINE FOREST CONSERVATION AND

MANAGEMENT SOCIETYINTERESTED PARTY

EXPARTE

PAMOJA NANIGHI FOREST CONSERVATION AND USERS SOCIETY

IBRAHIM RAMADHAN SHORA.....EXPARTE APPLICANTS

JUDGMENT

1. The exparte applicants in this Judicial Review Application dated 9/02/2016 are seeking the following prayers:-

(i) An Order of Mandamus and prohibition to compel the Eco-System Conservator Tana River County (MR. PETER M. KIOKO) to issue a movement Permit to the Applicant herein PAMOJA NANIGHI FOREST CONSERVATION AND USERS SOCIETY for the movement of produced and collected charcoal produce from JARA, GIABHEMA, PAZONI, DARBA, KAKATE, BAWAMA, and DARIME charcoal collection and buying centres to various consumers in various parts of the Country.

(ii) An Order of prohibition prohibiting and/or restraining the Eco- System Conservator Tana River County (MR. PETER M. KIOKO) from declining and/or refusing to issue a movement permit to PAMOJA NANIGHI FOREST CONSERVATION AND USERS SOCIETY for the movement of produced and collected charcoal produce from JARA, GHABHEMA, PAZONI, DARBA, KAKATE, BAWAMA, DABHOLOJAJAVO and DARIME charcoal collection and buying centres to various consumers in various parts of the Country.

(iii) An Order of prohibition prohibiting the Senior Resident Magistrate Hola Law Courts from proceeding with the hearing of HOLA CRIMINAL CASE NO. 207 OF 2015 REPUBLIC =VERSUS= IBRAHIM RAMADHAN SHORA.

(iv) An Order of prohibition prohibiting Eco-System Conservator Tana River County (MR. PETER M. KIOKO) and the Area Chief Nanighi Location (MOHAMED HIRIBAE RAMADHAN) from colluding with and allowing or permitting NANIGHI RIVERLINE FOREST CONSERVATION AND MANAGEMENT SOCIETY to collect charcoal produce from JARA, GHABHEMA, PAZONI, DARBA, KAKATE, BAWAMA, DABHOLO, JAJAVO and DARIME which are the charcoal buying and collection centres of PAMOJA NANIGHI FOREST CONSERVATION AND USERS SOCIETY.

(v) THAT the grant of such leave do operate as a stay of all the continuing and intended actions by the Eco-System Conservator Tana River County (MR. PETER M. KIOKO), the Area Chief Nanighi Location (MOHAMED HIRIBAE RAMADHAN), the Office of the Director of Public Prosecution - Hola and the Senior Resident Magistrate Hola Law Courts pending the hearing, determination and final disposal of the substantive application for Judicial Review.

(vi) THAT this Honourable Court be pleased to issue any other or further consequential Orders and/or directions that it may deem fit and just to issue.

2. The Application is supported by the affidavit of IBRAHIM RAMADHAN SHORA in which he deposed as follows:-

(i) THAT I am a male adult individual of sound mind and disposition and I am the 2nd Ex-parte applicant herein and the chairman of the 1st Ex-parte applicant herein conversant with all the matters pertaining hereto and therefore competent to swear this affidavit.

(ii) THAT the 1st Ex-parte Applicant is a Society registered under the Societies Rules, 1968 of the Societies Act Laws of Kenya whose objectives and purpose are: environmental conservation Nanighi Location in Tana River County and for transportation and marketing of charcoal to various destinations in the country in accordance with the Charcoal Rules and regulations. I annex hereto a copy of the certificate of registration and mark it IRS-1.

(iii) THAT the 1st Ex-parte Applicant was duly and legally registered by following all the required procedures which are obtaining a letter from the area chief, a letter from the Chewele Ward Administrator and a no objection letter from the 1st Respondent. I annex hereto copies of the said letters and mark them IRS- 2 (a), IRS- 2(b) and IRS- 2(c).

(iv) THAT I am the 2nd Ex-parte Applicant and the Chairman of PAMOJA NANIGHI FOREST CONSERVATION AND USERS SOCIETY the 1st Ex-parte Applicant herein and a resident of Nanighi Location in Bura -Tana within Tana River County. I annex hereto a copy of the constitution of the 1st Ex-parte Applicant and mark it IRS-3.

(v) THAT The 1st respondent herein who is the Eco-System Conservator Tana River County (MR. PETER M. KIOKO) has maliciously and ultra vires without any reasonable cause or justification declined and refused to issue a movement permit to the 1st Ex-parte Applicant herein for the transportation and marketing of charcoal from various charcoal buying and collecting centres in Nanighi Area to various destinations.

(vi) THAT the said Eco-System Conservator Tana River County (MR. PETER M. KIOKO) and the Area Chief Nanighi Location (MOHAMED HIRIBAE RAMADHAN) have colluded with and are allowing or permitting NANIGHI RIVERLINE FOREST CONSERVATION AND MANAGEMENT SOCIETY the Interested Party herein and who are a rival society to the 1st Ex-parte Applicant herein to collect charcoal produce from JARA, GHABHEMA, PAZONI, DARBA, KAKATE, BAWAMA, DABHOLO, JAJAVO and DARIME which are the charcoal buying and collection centres of PAMOJA NANIGHI FOREST CONSERVATION AND USERS SOCIETY the 1st Exparte Applicant herein.

(vii) THAT the Interested Party herein is also a Society duly registered under the Societies Rules 1968 of the Societies Act Laws of Kenya whose objectives and purpose is similar to that of the 1st Ex-parte Applicant. I annexe hereto a copy of certificate of registration of the interested party and mark it IRS-4.

(viii) THAT I was initially a member and the Chairman of NANINGI RIVERLINE FOREST CONSERVATION AND MANAGEMENT SOCIETY the Interested Party herein until 3rd March, 2015.

(ix) THAT in a General meeting held by the Interested Party herein on the 3rd March, 2015 and after lengthy discussion by all members it was unanimously agreed that the society be split into only two (2) sections whereby a resolution was that the Interested Party to remain with Eight (8) collection points i.e BATINI, KILIMO, MATAGALA, SUKUNI, SERO, SOBU, DUKANATU and NANIGHI JUU while the other Nine (9) collection points i.e JARA, GHABHEMA, PAZONI, DARBA, KAKATE, BAWAMA, DABHOLO, JAJAVO and DARIME which were to be managed by the new society to be formed. I annex hereto minutes of the said meeting and mark them as a bundle IRS-5.

(x) THAT it was at that point where I tabled my resignation letter to the members upon which the Secretary demanded for an explanation for my resignation whereupon I stated I had served for Twenty Seven (27) months for the society and wanted to give other members an opportunity to serve. I hereto annex a copy of the said resignation letter and mark it IRS-6.

(xi) THAT elections were then conducted in a later date where new office bearers of the Interested Party were elected in which one ALI HIYESA BADHADHA, ISSE ABDULAHI MOGOW and SALIMA JUMA GASURA were elected as officials being -Chairman, Secretary and Treasurer respectively.

(xii) THAT the said ALI HIYESA BADHADHA was initially the Vice Chairman and the said ISSE ABDULAHI MOGOW was the Secretary which post he retained after being re-elected.

(xiii) THAT when I opted out as Chairman of the Interested Party, I joined hands with other members and formed a new society which is the 1st Ex-parte Applicant herein and I was successfully elected as the Chairman of the 1st Ex-parte Applicant. I annex hereto copies of minutes to that effect and mark them as a bundle IRS-7.

(xiv) THAT after I resigned, and in accordance with the provisions of the Society's Constitution, the Vice Chairman took full charge of the interested party pending general elections and all members resolved that another meeting was to be held where all books of account and other relevant documents were to be handed over and the then Secretary and Treasurer agreed and promised to update their records in Three (3) weeks from then.

(xv) THAT since that time no meeting was convened for handing over even though I have been demanding for the same to enable the officials handing over conducted and all members be notified of the financial status of the Interested Party but the new officials of the Interested Party have maliciously without any reasonable cause or justification refused to convene such meeting and bring forth the financial records.

(xvi) THAT on the 7th day of July, 2015 the officials of the Interested Party maliciously colluding with the Eco-System Conservator Tana River County (MR. PETER M. KIOKO) and the Area Chief Nanighi Location (MOHAMED HIRIBAE RAMADHAN) at the Hola Forest Office where they summoned me and forcefully attempted to obtain the registration Certificate of the Interested Part herein which was in my custody awaiting official handing over but when the I resisted and declined to hand it over demanding for a meeting for the same to be handed over together with other official documents and books of accounts, the 1st Respondent herein ordered for my arrest upon which I was frog marched to Hola Police Station where I was charged with the offence of failing to comply with a lawful requirement contrary to section 54 (1) (c) of the Forest Act Cap. 385 Laws of Kenya in HOLA CRIMINAL CASE NO. 207 OF 2015 REPUBLIC =VERSUS= IBRAHIM RAMADHAN SHORA. I annex hereto a copy of the charge sheet and mark it IRS-8.

(xvii) THAT the said charges which were preferred against me were only meant to frustrate me to cover up the dubious,

activities of the 1st and 2nd Respondents in collusion with the officials of the Interested Party.

(xviii) THAT immediately I was charged, the officials of the Interested Party colluding with the 1st and 2nd Respondents started to obstruct and prevent the 1st Ex-parte Applicant and its officials including myself from producing, collecting, buying, selling and transporting charcoal from the said designated centres being JARA, GHABHEMA, PAZONI, DARBA, KAKATE, BAWAMA, DABHOLO, JAJAVO and DARIME and contrary to the resolutions passed on the 3rd March, 2015 the Interested Party being protected by the 1st and 2nd Respondents trespassed and started to collect and transport charcoal from the centres of the 1st Ex-parte Applicant thus subjecting the 1st Ex-parte Applicant to suffer unnecessary inconveniences, great loss and damage to date.

(xix) THAT due to the foregoing reasons the officials of the 1st Exparte Applicant including myself moved to Court in Hola and filed a Civil Suit being HOLA SRMCC NO. 16 OF 2015 where we obtained an Order which was issued on the 23rd July, 2015 restraining the officials and members of the Interested Party from interfering with the charcoal collection centrem designated for the 1st Ex-parte Applicant herein. I annex hereto copies of the Order and pleadings of the said Civil Suit and mark the Order as IRS-9 (a) and the said pleadings as a bundle IRS-9 (b).

(xx) THAT after the said Orders were served upon the officials of the Interested Party and other copies of the Order served upon the 1st and 2nd Respondents herein though they were not parties to the said Suit, the 1st and 2nd Respondents deliberately and intentionally disregarded the said Orders and went ahead to incite the officials and members of the Interested Party to disregard the Court Order and continue interfering with the said centres designated for the 1st Ex-parte Applicant.

(xxi) THAT as a result of the said disregard of the court order, the Honourable Senior Resident Magistrate Hola Law Courts after being informed of the same, he issued summons to the 1st and 2nd Respondents to come to Court to Show Cause why they should not be punished for incitement to disobey Court Order. I annex hereto copies of the said summons and mark them IRS-10 (a) & IRS-10 (b) .

(xxii) THAT the said Civil Suit is still pending at Hola Law Courts and the 1st and 2nd Respondents together with the officials of the Interested Party have continued to frustrate the 1st Exparte Applicant and I.

(xxiii) THAT the said acts are malicious and a contravention of the Provisions of the administrative action Act No. 4 of 2015, Articles 47 and 27 (3) of the Constitution of Kenya 2010 and against the cardinal principles of natural justice.

(xxiv) THAT the said economic activities carried out by the 1st Exparte Applicant herein is the only source of income to all its members and therefore the acts of the 1st and 2nd Respondents together with the Interested Party have subjected suffering to the said members.

(xxv) THAT in denying or refusing to issue the Pt Ex-parte Applicant with a movement permit the 1st Respondent is acting out of malice with vested interests to frustrate the Exparte Applicants.

3. The interested party filed a Replying Affidavit sworn by SALIMA JUMA GASURA, an official of the interested party in which she deposed as follows:-

(i) THAT I am a female adult of sound mind and disposition hence competent to swear this affidavit.

(ii) THAT I am an official of the Interested Party organization and therefore have the consent and authority to swear this affidavit on its behalf.

(iii) THAT I have read and understood the Ex parte Applicants application filed in Garsen High Court and the Supporting Affidavit, thereto and wish to respond as follows:-

(iv) THAT the said Ex parte Applicants application is vexatious, frivolous, improper and an abuse of the Court process.

(v) THAT the averments contained in the Affidavit by the 2nd Ex parte Applicant are merely half-truths and falsehoods being peddled by the 2nd Ex parte Applicant to the detriment of the Interested Party.

(vi) THAT prior to the formation and registration, of the 1st Ex parte Applicant society the 2nd Ex parte Applicant was the Chairman of the Interested Party until he resigned in huff on the 3rd day of March 2015.

(vii) THAT the 2nd Ex parte Applicant has been, and continues to use the information he acquired during his tenure as the Interested Party's Chairman to unfairly set himself up in competition against the Interested Party.

(viii) THAT from the inception of the Pt and 2nd Ex parte Applicants have actually been frustrating the activities of the Interested. Party and not vice versa by

(a) Withholding the Interested Party's Certificate of Registration for no reason.

(b) Filing a Civil suit being Hola SRMCC No. 16/2015 wherein the 1st & 2nd Ex parte Applicants are Plaintiffs and

Interested Party the Defendant obtaining an injunction and later on for no reason whatsoever staying the same suit.

(c) Lifting names of some of the members of the Interested Party Society and purporting them to be its duly registered members (*Annexed hereto and Marked as SJG1 is a handwritten disclaimer of the dissenting members of the 2nd Ex parte Applicant society*).

(d) I plagiarizing the constitution of the Interested Party and passing it off as its own (*Annexed hereto and Marked as SJG 2 a and h are copies of the said constitutions*).

(e) Declining to handover the Interested Party's documents, furniture, e.t.c that he and in his custody and use as the Interested Party Chairman.

(ix) THAT the 2nd Ex parte Applicant moved to Hola Law Courts seeking injunctory Orders vide Hola SRMCC No. 16 of 2016; IBRAHIM RAMADHAN SHORA & 2 OTHERS vs ALI HIYESSA BADHADHA & 2 OTHERS

(x) THAT on the 22nd July 2015 a temporary order of injunction was granted Ex parte to the 2nd Ex parte Applicant restraining the Interested Party from carrying out the production, collection, selling, buying and transporting charcoal from the areas of Jara, Ghebema, Pazoni, Darba, Kakate, Bawama Dhabolo, Jajare and Darime (*Annexed hereto and Marked as SJGS is a copy of the said order dated the 23rd day of July 2015*).

(xi) THAT since the date of the said order the Interested Party members have never set foot on the said areas.

(xii) THAT it is therefore perturbing to hear the wild claims of the Ex parte Applicants.

(xiii) THAT the said issues raised herein are issues before a competent Court of Law wherein to date an injunction favouring the Ex parte Applicants subsists.

(xiv) THAT the instant application before Court clearly shows the Ex parte Applicants devices of attempting to forum shop. Yet he is the one who took the Interested Party to Court in Hola in the first place.

(xv) THAT by moving the High Court at Garsen the Ex parte Applicants are seeking to have this Court decide the merits and demerits of a suit currently pending before another Court of competent jurisdiction.

(xvi) THAT it is entirely untrue that the Interested Party has ever colluded with the 1st Respondent in any way to frustrate the Ex parte Applicants and particularly on the 7th day of July 2015.

(xvii) THAT the summoning of the 2nd Ex parte Applicant to the Offices of the Eco Systems Conservator the 1st Applicant (Mr. Peter Kioko) were simply procedural following the fact that he had refused to hand over the Interested Party's Certificate of Registration after his resignation. To date the Ex parte Applicant still holds the Interested Party's Certificate of Registration.

(xviii) THAT in response to paragraph 5 of the Verifying Affidavit the 1st Respondent has a Criminal Case in Hola Law Courts wherein the 2nd Ex parte Applicant is the accused person. (HOLA CR NO. 207/15 (R vs IBRAHIM RAMADHAN SHORA) - FAILING TO COMPLY with a lawful requirement contrary to Section 54(1) of the Forest Act CAP 385 Laws of Kenya (*Annexed hereto and Marked as SJG 4 is a copy of the said charge sheet*).

(xix) THAT to the best of my knowledge die Interested Party has never at any one point in time agreed to the splitting of the society into 2 parts (A fact still in issue in the lower Court) but were instead surprised to find minutes referring to the splitting of the Society. (*Refer to Ex parte Applicants annexure No. IRS 5*).

(xx) THAT the minutes giving rise to the 1st Ex parte Applicant Society are foreign to me as they are typed yet all our minutes are normally handwritten and signed. (*Annexed hereto and Marked as SJG 5 are the handwritten copies of the minutes of the 3rd March 2016*)

xxi) THAT the Interested Party is a Society having a membership of over Three Hundred members and serving over 3000 households and therefore an issue as weighty as splitting the society cannot have been decided by a handful of members, exactly 12 members. (*Refer to IRS 6*) on attendance.

(xxii) THAT it is the norm that on a date of deliberating weighty society it is the rule that the following people/parties must be in attendance:-

(1) All members of the Interested Party Society

(2) All Officials from the Interested Party Society

(3) Stakeholders:-

a) Chairperson vision 2030

- b) Ecosystems Conservator Tana River
- c) Ward Administrator Chewele ward
- d) Wildlife Compensation and Conservation Official
- e) Kenya Wildlife Official
- f) Area Chief Nanighi Location
- g) Assistant Chief Nanighi

(Annexed hereto and Marked as SJG 6 is a sample of list showing a full Coram for a meeting of this nature)

(xxiii) THAT the said proceedings before this Court are attempts aimed at intimidating upstanding Civil Servants from carrying out their duties impartially without fear or favour.

(xxiv) THAT this is a tactic employed by the 2nd Ex parte Applicant and not for the 1st time.

1) On the 16th September 2016 the Area Chief Nanighi Location 2nd Respondent was summoned and cross examined on various wild allegations raised by the then Plaintiff now Ex parte Applicant and the same were

founded to be untrue.

2) Similarly the 1st Respondent was summoned and cross examined by the Plaintiff's Advocate and Court and he was, and no wrongdoing was established on both the 1st & 2nd Respondents.

(xxv) THAT shortly hereafter in February 2016 the proceedings herein were instituted and subsequently stayed the 1st & 2nd Ex parte Applicants Lower Court Civil and Criminal cases for reasons only best known to him.

(xxvi) THAT the Interested Party herein has in no way interfered with and or infringed upon the rights of the Ex parte Applicants and if anything the Interested Party continues to face the brunt of his onslaught of filing suit after suit at his whim and caprice to the Interested Party's detriment.

4. I have considered the Judicial Review Application filed herein together with the supporting Affidavit. I have also perused the Replying Affidavit filed in opposition to the application. My findings are as follows;

(i) I find that judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities.

(ii) It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament and guiding public authorities and ensuring that they act lawfully and that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

(iii) In the current case, I find that there is no evidence that the Respondents herein acted maliciously or ultra vires as the Ex parte Applicants did not adduce evidence in support of their case.

(iv) The Ex parte Applicants cannot rely on submissions which were filled without leave of the court to prove their case. I find that the Ex parte Applicants have failed to prove that they are entitled to the orders they are seeking.

(v) I accordingly dismiss the judicial Review Application with costs to the Interested party. The Respondents are not entitled to any costs as they did not appear in court to defend this suit.

Dated, Delivered and Signed at Malindi this 30th November, 2017 in the

presence of the parties.

ASENATH ONGERI

JUDGE.