REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 392 OF 2006

IN THE MATTER OF: AN APPLICATION BY ATV SAFARI LIMITED

AND ZOMENI LION HILL CAMP LIMITED FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND AN ORDER OF STAY

AND

IN THE MATTER OF: THE WILDLIFE (CONSERVATION AND

MANAGEMENT) ACT CHAPTER 376 LAWS OF KENYA

AND

IN THE MATTER OF: KENYA WILDLIFE SERVICE

AND

IN THE MATTER OF: THE WILDLIFE (CONSERVATION AND

MANAGEMENT) (NATIONAL PARKS) (AMENDMENT) REGULATION, 2003

AND

IN THE MATTER OF: TSAVO EAST NATIONAL PARK

1. ATV SAFARI LIMITED

2. ZOMENI HILL CAMP LTD…….……PLAINTIFFS

VERSUS

TSAVO EAST NATIONAL PARK……..DEFENDANT

RULING

By way of a notice of motion dated 24th April, 2006 the *Ex-parte* applicant prays for orders that:

"(a) An order of certiorari be made to bring to this court the decisions made by the Assistant Director of Tsavo East National Park on 12th September, 2005, 31st January, 2006 and 10th March, 2006 for the purpose of quashing them.

(b) Costs of these proceedings and of the application for leave be provided for."

Leave to file the motion had been obtained vide the chamber summons dated 12th April, 2006 which was brought under certificate of urgency. The said leave was ordered to operate as a stay of the implementation of the decision of the Assistant Director until the matter was heard and determined. Parties filed their submissions in the matter and the case was listed for ruling by notice. At the outset I wish to apologize for the delay in preparation and delivery of this ruling. This has been caused by the hearing of Election Petitions, the High Court Service Week, the Court Vacation as well as other vagaries of duty. The delay is sincerely regretted.

THE APPLICATION

The *Ex parte* applicants are both limited liability companies incorporated in Kenya and both are in the tourism business which includes the accommodation and transportation of clients to various tourist destinations for gain. The 1st applicant operates Sagala Lodge at Voi while the second applicant operates Zomeni Lion Hill Camp which is also at Voi within the Tsavo East National Park (hereinafter referred to as *'the Park'*). The park is managed by the Kenya Wildlife Service under the provisions of the Wildlife (Conservation and Management) Act, Cap 376, Laws of Kenya (hereinafter referred to as *'the Act'*).

In exercise of the powers conferred by section 16 of the Act, the Minister for Environment, Natural Resources and Wildlife made the Wildlife (Conservation and Management) (National Parks) (Amendment) Regulations 2003 (hereinafter referred to as the Regulations). The 2003 Regulations amended the previous regulations by deleting parts II, III, IV and V of the previous regulations and were published as Legal Notice No. 9 in the Kenya Gazette Supplement No. 10 of 24th January, 2003. Under these regulations the Park was classified as a category B National Park. Daily entry fees at the time was as follows:-

- Kenyan citizens - Kshs. 100/=
- Kenyan residents - Kshs. 500/=
- Non-Residents - Kshs. USD 27/=

The applicants submitted that this daily fee was to be levied once and thereafter one could enter the park as many times as they wished during that day. This is what had been the norm before September, 2005.

On 12th September, 2005, the Assistant Director of the Park at a meeting with Tourist Industry stakeholders decided to introduce, implement and review respectively a *'No re-entry rule'*. This Rule appeared to allow for re-entry only to visitors during a 24 hour period. Anyone who paid for a 48 hour visit to the park would not be permitted re-entry for lunch on the same pass/ticket. The implementation of this no re-entry rule was done by way of a letter dated 31st January, 2006 and was to take effect from 1st April, 2006. By an unsigned memo dated 10th March, 2006, the Assistant Director revised the rule to allow for a lunch time re-entry for one day visits.

The applicants submitted that the Assistant Director had no power, or jurisdiction to impose and implement any rule or regulation apart from the regulations made by the Minister for Environment, Natural Resources and Wildlife. Therefore by purporting to make, revise and implement the *'No re-entry'* rule, the Assistant Director was said to have usurped the powers of the Minister. The effect of this rule as argued by the applicants was to compel their clients and employees (who were not being accommodated within the park) to illegally remain inside the park for 24 hours in order to fully utilize the daily fees paid. The rule was therefore said to be ambiguous, absurd, irrational, unreasonable, discriminatory and uncertain as it appeared to allow re-entry **only** to those visiting for one day only.

THE REPLY

The notice of motion filed by the applicants was opposed. The Assistant Director of the Tsavo Conservation Area **Mr. Jonathan Kirui** filed on 11th September, 2006 a replying affidavit. He submitted that in the past the respondent had allowed visitors entry into the park upon payment of the entry fee. Despite there being no legal basis for doing so, both visitors and tour operators were regularly allowed re-entry into the park. Part III of the 2003 regulations provided for daily fees for entry into the National Park while Part IX of the regulations provided for fees for camping and accommodation. The term *'Daily Fee'* was defined by paragraph 4 of Part IX to mean **"fee for one day (twenty four hours or part thereof) continuous stay within a specified national park"**. The respondent argued that this definition applied for the entire regulation from Part I to Part IX.

ANALYSIS

The scope of Judicial Review under the Supreme Court Practice 1997 Vol. 53/1 – 1416 is

> **"concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself."**

In **COUNCIL OF CIVIL SERVICE UNIONS –VS – MINISTER FOR THE CIVIL SERVICE [1984] All ER 935** Lord Diplock states thus:

> **"Judicial review was I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety" ……"**

Likewise in the case of **KENYA NATIONAL EXAMINATION COUNCIL – VS – REPUBLIC EX PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS, CIVIL APPEAL NO. 266 OF 1996,** the Court of Appeal in Kenya in exploring the scope of judicial review said of certiorari that:

> **"CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with of for such like reasons."**

It is important to note before beginning this analysis to note that this issue has now been overtaken by events. **Mr. Kinyua** counsel for the applicant has conceded that the contentious 2003 Regulation being challenged has since been changed. Currently the ambiguity in the Regulation has been cured by the 2010 Regulation which defines daily fees as fees for single entry. It is conceded that currently if one enters the park then exits for any reason, one would have to pay fees again to re-enter the park – a clarity that did not exist in 2006. He clarified that the applicants now seek only to quash the letters of the Assistant Director.

The applicants' main contention was that the definition of *"daily fee"* ought to have been confined to Part IX of the regulations and ought not have been applied to Part III dealing with fees for entry and re-entry into the Park. The applicants' case was confined to the decision of the Assistant Director to implement this rule as set out in the minutes, letter and memo. It is trite law that no man should be condemned unheard, however it is evident from the minutes annexed to the supporting affidavit (to the application) that a meeting was held between the respondent and industry stakeholders which minutes ("SB2") indicate that the re-entry rule was discussed and the applicants did make representations challenging the manner in which it was proposed to be implemented. They cannot therefore claim not to have been granted an opportunity to put forth their views and/or concerns. Further it is to be noted that the directive resulting in the rule was in fact the 2003 regulations and not the minutes, letter or memo attributed to the Assistant Director. The Regulations had actually been in effect since 2006 and the Assistant Director was only seeing to its implementation. It is not for this court to decide whether the implementation of this rule

was merited or made commercial sense. The furthest the court can venture is to decide whether the decision (of the Assistant Director) was irrational, by the standard of **ASSOCIATED PROVINCIAL PICTURE HOUSES LTD. VS. WEDNESBURY CORPORATION [1948] 1K.B. 223**. Under this principle where a body mandated to make a decision makes a decision that is so unreasonable that no person applying his mind to the facts of the case would reach such a decision, the court can quash such a decision for being unreasonable. Such an illogical, unreasonable, irrational, or preposterous decision would automatically invite the court to look into the merits of such decision. In this case, the rationale behind the implementation was the 2003 Regulations which were set up by the Minister under his legal mandate. The Assistant Directors implementation was based on the interpretation of those regulations. Was his interpretation illogical and/or unreasonable? Paragraph 4 of Part IX states that:

> **"For the purpose of these Regulations, a *'daily fee'* is a fee for one day (twenty four hours or part thereof) continuous stay within a specified national park."** [*my own emphasis*]

A clear reading of the above means that the term daily fee refers to a 24 hour period and further that this definition is applicable to the entire 2003 Regulations and not just to Part IX as argued by the applicants. No other interpretation would be logical. The fact that the 2010 regulations have been framed in this manner lends credence to this reasoning. Thus there was nothing unreasonable and/or illogical in the actions of the Assistant Director or in his manner of implementing the 2003 Regulations. The present application to quash his decision has no merit and is hereby dismissed in its entirety with costs to the respondent.

Dated and delivered in Mombasa this 28th day of February, 2014.

M. ODERO

JUDGE