



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**JUDICIAL REVIEW NO. 15 OF 2013**

**IN THE MATTER OF AN APPLICATION FOR LEAVE AGAINST THE KENYA FORESTRY SERVICE**

**AND**

**IN THE MATTER OF ELIUD KINEGENI**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA FORESTRY SERVICE.....RESPONDENT**

**AND**

**ELIUD KINEGENI.....SUBJECT**

**RULING**

1. In his application (*Notice of Motion*) dated 11th July 2014 and filed on 11th July 2014, the Applicant sought the following orders -

1. *THAT for reasons to be recorded, this application be certified as urgent, service be dispensed with in the first instance and the application be heard on a priority basis.*
2. *THAT the court finds that the seizure of the subject's motor vehicle registration number KAK 202X by the Respondent without any criminal proceedings either under the Forest Act or under the Traffic Act is unfair.*
3. *THAT the court finds that any purported forfeiture of the said motor vehicle by the Respondent for carrying forest produce and failure on his part to keep the detail of the driver culpable for the offence under the Traffic Act is unfair and contrary to the provisions of the Traffic Act and the Forest Act.*
4. *THAT subject to such conditions as the court may deem just under the circumstances, the court orders the release of motor vehicle registration number KAK 202X.*

2. The Application was based upon the grounds on the face thereof and the Supporting Affidavit of the Applicant sworn on 11th July, 2014. It was however opposed by the Respondent in the Grounds of Opposition dated 29th September 2014 and filed on 30th September 2014 which described the application as -

1. *misconceived, inept, bad in law and a classic case of the abuse of the courts' process;*
2. *drawn to perpetuate an illegality which is contrary to the law and public policy as was held in the case of WILSON NDOLO AYAH VS. NATIONAL BANK OF KENYA [2009] eKLR.*
3. *geared towards circumventing this court's orders issued on 29th May 2013, and*
4. *that the Applicant is already a contemnor of the court's orders to give details of the driver, without first purging the contempt.*
5. *the Respondent is vested with power to seize and detain any motor vehicle or vessel that is used in committing an offence under Section 49(d) of the Forest Act 2005.*

3. I will first deal with the grounds of objection. It is correct that this court by consent orders made on 23rd May 2013 did order the release of the Applicant's motor vehicle KAK 202X on the following conditions -

1. *supply of information on the particulars of the driver including his residence, area and location chief,*
2. *particulars of the alleged owner of the produce.*

4. Counsel for the Applicant came back to court on 13.06.2014 and submitted that the Applicant had been unable to locate the driver, who had disappeared from the area and further submitted that the Respondent has never commenced any proceedings for forfeiture of the motor vehicle, and that the Respondent be ordered to show cause why the motor vehicle should not be released to the owner, the Applicant.

5. By order made on the said date 13.06.2014, I directed that Notice do Issue to the Respondent to show cause why the subject motor vehicle should not be released to the registered owner, and I directed a mention for 4th July 2014 – when no response was forthcoming from the Respondent, prompting the Applicant to file the Application, the subject of this Ruling.

6. There is no question, as submitted by counsel for the Respondent, that the Respondent is vested to seize and detain any motor vehicle or vessel, that is used in committing an offence under Section 49 (d) of the Forest Act. The question however which begs an answer is what is the proper procedure for forfeiture of goods under the Forest Act 2005; or put differently whether the mere orders for forfeiture of produce under the Act includes forfeiture of the vehicle or vessel, without the necessity of a hearing of the owner of the motor vehicle or vessel before forfeiture.

7. The decision of the Court of Appeal in **Ndolo Ayah vs. National Bank of Kenya** (*supra*), supports both the Applicant and the Respondent. In that case the Appellant had been denied an opportunity to be heard on its defence. The court held that the Appellant had been denied an opportunity to present its case in the fullest sense. The rule of natural justice that no man shall be condemned unheard had been violated (**Local Government Board vs. Arlidge [1915] AC 120 followed**).

8. The said decision was followed in **PETERSON NJERU & ANOTHER VS. MARALAL SR MAGISTRATE AND ATTORNEY-GENERAL, (Kenya Forest Service, Interested Party [2010] eKLR** where the court (*Ouko J, as he then was, now Judge of Appeal*) held that -

***“Without hearing persons having an interest in the lorry, the learned magistrate was in violation of the rules of natural justice”, and issued an order of certiorari.***

9. This court made a similar decision in the case of **REPUBLIC VS. PRINCIPAL MAGISTRATE at ELDAMA RAVINE & 3 OTHERS [2014] eKLR.**

10. In addition to what I said in that case, I wish to cite the general law on forfeitures set out in Section 389A of the Criminal Procedure code, (Cap. 75, Laws of Kenya). The said section says -

***“389A – (1) where, by or under any written law (other than Section 29 of the Penal Code), any goods or things may be (but are not obliged to be) forfeited by a court, and that law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the court that the goods or things should be forfeited, it shall cause to be served on the person believed to be their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown and, at that time and place or on any adjournment, the court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things: -***

***PROVIDED that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner (if any) as the court thinks fit.***

***2. If the court finds that the goods or things belong to some person who was innocent of the offence in connection with which they may or are to be forfeited and who never knew nor had reason to believe the goods or things were being or were to be used in connection with that offence and exercised all reasonable diligence to prevent being so used, it shall not order forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they may be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.”***

11. In the case of **MWASI VS. REPUBLIC [1989] 544**, Bosire and Githinji JJ, held -

***“Forfeiture is a penalty ... It can only be treated as a penalty where the evidence clearly shows that the property forfeited belongs to the accused.”***

12. And in **PRIME SALT WORKS SALT WORK LTD VS. KENYA INDUSTRIAL PLASTICS LTD [2001] E.A. 528**, the court said inter alia -

***“... implicit in the concept of fair adjudication the two cardinal principles, namely that no man shall be judge of its own cause, and that no man shall be condemned unheard, that these two principles of natural justice must be observed by the courts save where their application is expressly excluded.”***

13. **Section 51-55 of the Forest Act 2005**, comprise Part V – Enforcement (of its provisions). The most relevant provision to our case is Section 55(1) which says -

***“55(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)***

***(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.”***

14. In **PETERSON NJUE NJERU VS MARALAL SENIOR RESIDENT MAGISTRATE & ANOTHER (supra)** Ouko J (as he then was) referred to the case of **WAKITATA VS. REPUBLIC**

[1977] KLR 619, a decision on, among other things, the interpretation of Section 56(2) of the Wildlife (Conservation & Management) Act which provided -

***“56(2) Upon the conviction of any person for an offence against this Act which relates to more than one animal or trophy, the court MAY inflict additional punishment in respect of each animal or trophy after the first five, not exceeding shillings six thousand or one half of the fine prescribed by this Act for such offence whichever is the less.”***

The court held -

***“We have emphasised the word “MAY” because we are of the view that it gives a discretion to a court whether or not to impose separate fines for additional animals or trophies. This is to be contrasted with somewhat similar provisions in Section 47(2) and (3) of the Wild Animal Protection Act (which was repealed by the present Act) where the word “SHALL” was used regarding penalties for additional animals, which the Court of Appeal for East Africa held to be a mandatory sentence – (in HASSAN VS. REPUBLIC [1975] E.A. 221.”***

15. The expression “MAY” employed in Section 55(1)(2) is in “*pari materia*” with the expression “MAY” in Section 56(3) of the Wildlife (Conservation and Management) Act, 1976. It is therefore not mandatory each time a person is convicted for an offence under the Forests Act 2005, and the forest produce confiscated, that the vessel or vehicle carrying such forest produce, will be automatically forfeited.

16. Besides, and perhaps more fundamental, the principle of notice to the owner of the vessel or vehicles contained in Section 55(1)(b), and the procedure for forfeiture set out under Section 389A of the Criminal Procedure Code makes it absolutely clear that forfeiture of any vehicle or vessel found with forest produce without the necessary permits, is subject to inquiry as to the ownership and a right to hearing of such owner before the vehicle or vessel is forfeited.

17. The motor vehicle, the subject of the proceedings herein has not been forfeited. It was found and detained by the Respondent. It is unclear what happened to its produce. The driver of the motor vehicle is said to have disappeared. This is not uncommon in these areas of Kenya. The motor vehicle has been wasting away at the Respondent's yard in Narok since December 2012. No charges were preferred against either the driver or the owner.

18. It is unreasonable and illegal for the Respondent to detain the Applicant's motor vehicle without preferring charges against either the driver (*who is alleged to have disappeared or moved away from the area*), or the Applicant who is known to the Respondents, or instituting forfeiture proceedings.

19. In the circumstances, I allow the application dated 11th July 2014, and direct the Respondent to release the motor vehicle to the Applicant. The forest produce (*if any*) shall be however be forfeited to the service. Because the Applicant has been singularly unhelpful to the Respondent, I direct that each party shall bear its own costs.

20. There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 31<sup>st</sup> day of October, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**