REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW CASE NO. 285 OF 2012

IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW OF MANDAMUS, CERTIORARI AND PROHIBITION AGAINST THE KENYA FOREST SERVICE

IN THE MATTER OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE FORESTS ACT, 2005 OF THE LAWS OF KENY

IN THE MATTER OF ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, NO. 8 OF 1999

REPUBLIC

VERSUS

KENYA FOREST SERVICE.....RESPONDENT

EXPARTE AND CLEMENT KARIUKI, GERALD NGATIA AND TECLA CHUMBA SUING AS THE CHAIRMAN, SECRETARY AND TREASURER OF THE NATIONAL ALLIANCE OF COMMUNITY FOREST ASSOCIATION.....APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 17th July 2012 filed on 18th July 2012, the *ex parte* applicants herein seek the following orders:

a. **That certiorari do issue and bring into this Honourable court and to quash the decision of the Respondent expressed in Daily Nation advertisement dated 14th June 2012 calling for individuals and interested institutions to apply for concessions in state forest plantations, for parcels of between 1,000 – 12,000 hectares each.**
b. **That prohibition do issue to prevent any further action by the respondent to actualize the said advertisement**
c. **That prohibition do issue to the Respondent to prevent any decision or action by the Respondent to grant concessions or alienation of any forest land to any individual or private enterprise and any procurement process that may enhance such actions without following the strict letter and spirit of the Constitution of Kenya, the statutory law and the rules of**

natural justice.

d. **That prohibition do issue against the Respondent to restrain and prevent the Respondent and/or any of its officials , agents, servants or officers from processing of any bids that may be received by the Respondent arising out of the impugned advertisement pending the final determination of this application or further orders of the court.**
e. **That mandamus do issue to the Respondent to compel the Respondent to comply with the constitution of Kenya, the forests Act, 2005 to ensure that forests and catchment areas in Kenya are protected and that a tree cover of at least ten [10%] is maintained in Kenya.**
f. **That the costs of this application be paid by the respondents.**

***EX PARTE* APPLICANT'S CASE**

2. The application is based on the Statutory Statement filed on 16th July, 2012 and a verifying affidavit sworn by **Gerald Ngatia**, the applicant's secretary the same day.
3. According to the said Statement, the grounds upon which the application is based are as follows:

1. **The application, National Alliance of Community Forest Association (NACOFA) is a community alliance registered under the societies Act in 2005 as a focal point for all Community Forest associations (CFAs) in Kenya.**
2. **NACOFA advocates for and supports the rights of communities to actively participate in Natural Resource Management and equitable sharing of accruing benefits.**
3. **NACOFA facilitates activities of the members by generating and disseminating relevant information for sustainable management of forest resources and poverty alleviation.**
4. **NACOFA does this by:**

   a. Linking member associations, the government and other stakeholders.

   b. Advocating for community recognition as primary stakeholders and beneficiaries in natural resource management,

   c. Supporting and facilitating member associations in developing management plans and agreements with the authorities.

   d. Building the capacity of member associations on policy and legislation matters in Natural Resources Management.

   e. Lobbying for sustainable management and use of natural resources by all stakeholders,

   f. Facilitating effective networking and collaboration among organizations,

   g. Supporting Community based Monitoring and evaluation of natural resources and dissemination of information among stakeholders.

5. **The functions of the Respondent Kenya Forest Service as imposed by statute are to:**

   (a) Formulate for approval of the Board, policies and guidelines regarding the management, conservation and utilization of all types of forest areas in the country;

   (b) Manage all State forests;

   (c) Manage all provisional forests in consultation with the forest owners;

   (d) Protect forests in Kenya in accordance with the provisions of this Act;

   (e) Promote forestry education and training;

(f) Collaborate with individuals and private and public research institutions in identifying in research needs and applying research findings;

(g) Draw or assist in drawing up management plans for all indigenous and plantation state, local authority, provisional and private forests in collaboration with the owners or lessees, as the case may be;

(h) Provide forest extension services by assisting forest owners, farmers and Associations in the sustainable management of forests;

(i) Enforce the conditions and regulations pertaining to logging, charcoal making and other forest utilization activities;

(j) Collect all revenue arid charges due to the Government in regard to forest resources, produce and services;

(k) Develop programmes and facilities in collaboration with other interested parties for tourism, and for the recreational and ceremonial use of forests;

(l) Collaborate with other organizations and communities in the management and conversation of forests and for the utilization of the biodiversity therein;

(m) promote the empowerment of associations and communities in the control and management of forests;

(n) Manage forests on water catchment areas primarily for purposes of water and soil conservation, carbon sequestration and other environmental services;

(o) Promote national interests in relation to international forest related conventions and principles;

(p) Enforce the provisions of this Act and any forestry or land use rules and regulations made pursuant thereto or to any other written law;

(q) In consultation with the Attorney – General, train prosecutors from among the forest officers for purposes of prosecuting court cases under this Act in accordance with any other law relating to the prosecution of criminal cases.

6. **On the 14th June 2012, the Respondent Kenya Forest Service (KFS), through an advertisement in the Daily Nation newspaper, invited individuals and interested institutions to apply for concessions in state forest plantations, for parcels of between 1,000 – 12,000 hectares each.**
7. **The opening of bids is scheduled for July 16th 2012.**
8. **If this process is allowed to proceed, it will result in hundreds of thousands of hectares of forest land being allocated to individuals and companies for a period of 30 years and more. The affected forests are Mt. Kenya, North Rift, Aberdares and Mt. Elgon.**
9. **Parliament is yet to create the laws and regulations to govern the concession of Kenyan Resources to private persons;**
10. **No public consultation was conducted prior to the issuance of the notice;**
11. **Parliament and the Government generally have not enacted the rules and regulations for the equitable sharing of resources;**
12. **The Respondent KFS has not provided the public with any information as to how the decision to issue the notice was arrived at;**
13. **The Respondent ignored the law and the rules of natural justice and the Constitution of Kenya in calling for the impugned bids.**
14. **The national values and principles as expressed in the Constitution's Article 10, as well as**

national obligations to the same have been grossly overlooked.

15. **The concessions will in effect pre-empt forthcoming county governments and their citizens from exercising any form of power over these forest resources, as well as deprive them commensurate benefits for a period of 30 years or more.**
16. **Forest stakeholders have been alienated in the decision making process that culminated in KFS publicly soliciting for expressions of interest (EOIs) for concession awards.**
17. **There is a failure to adhere to the Forests Act 2005, which is the core legislation that governs management of forest resources, Section 35(1) of this Act, requires that every state forest, local authority forest and provincial forest be managed in accordance with a management plan. However, management plans for the four targeted forests have not been made public nor been presented publicly as a basis for the KFS' decision to grant concessions in respect of these forests.**
18. **Article 69(1) (a) and (h) of our Constitution, which forest communities expected to deliver long awaited tangible benefits from natural resources, stand in jeopardy.**
19. **Forest communities have undergone many years of frustration as they sought to legalize their entitlement to forest resources.**
20. **They have mobilized millions of shillings to support government led forest management planning, in the hope that this would culminate in access to forest resources. However, this has not been forthcoming. Hence, the communities have turned their focus on Article 69. The KFS move now serves to shatter this last resort.**
21. **The targeting of Kenya's major water towers for this concessioning is extremely ill advised and ill informed. The acute water shortage of the late 1990s that Kenya suffered due to the destruction of these water towers and the accompanying power rationing that almost brought our economy to its knees, should keep us well advised that these areas need to be under intensive conservation as opposed to concessions.**
22. **The concessions would place these fragile ecosystems in the hands of business people whose main drive is to maximize benefits.**
23. **This is likely to lead to depletion of the national forest cover and deprive the country of the tremendous amenities provided by forests.**
24. **The manner in which the call for the Expression of Interests is articulated accords concession holders the prerogative to determine communities' involvement during the concession period. In actual fact it ambiguously presents the communities' role as providing support to the concession and not to share in the benefits of the concession.**
25. **When concessions are one type of forest utilization regime, they are not necessarily the best when applied exclusively over an entire forest unit. They compromise a variety of other economic uses such as non-timer forest products harvesting, beekeeping, ecotourism, crops production, sustenance of hydrological functions among others.**
26. **Therefore, the implication of concessions is that the variety of economic uses that present opportunities for a bigger number of people will be invalidated.**
27. **The Applicant has protested to the Respondent to no avail**
28. **The Respondent's actions amount to an abuse of discretion and an exercise of powers which the Respondent does not process and/or are beyond the jurisdiction of the Respondent.**
29. **The Applicant stands to suffer irreparable loss if these orders are not allowed.**
30. **The Respondent has failed to take into account and consider all relevant factors including the views of the Applicant.**
31. **That the actions of the Respondent are oppressive and unconscionable.**
32. **That the said actions of refusal have been taken without consultation or giving the Applicant any hearing despite several letters done to the Respondent.**
33. **That the Applicant has at all times complied with the law and intends to continue to comply with the provisions of the law.**
34. **It is in the interest of the justice that these orders are granted.**
35. **The Respondent has been asked in writing to comply with the law and rules of natural justice all in vain.**
36. **The applicant and its members seek to make positive contributions to forest management in Kenya.**

2. According to the applicant, a notice was issued by the Respondent in the Daily Nation Newspaper dated 14th June 2012 in which the respondent called for individuals and interested institutions to apply for concessions in state forest plantations, for parcels of between 1,000-12,000 hectares each. This advertisement surprised the applicant because the Respondent did not give the public any information as to how this decision was arrived at; the applicants were not aware of any environmental impact assessment conducted prior to the issuance of this notice; the applicants were not called upon to give their views; and the applicants were not aware of any laws, rules and/or regulations having been done by parliament to govern Forest concessioning. Despite the applicants lodging formal complaints with the Respondent, there was no avail.
3. According to the applicant, the actions of the respondent, unless restrained, are likely to lead to grave consequences as outlined in the Statement filed herein and there is bound to be grave consequences to the environment and economy and flora and fauna. To the applicant, the impact on forest management and forest use will be negative to the communities involved.
4. To the applicant, the decision by the respondent is mischievous, fraudulent and should be quashed since the Respondent has side-stepped Constitutional provisions regarding provisions of information, public consultation and concessioning yet the Constitution places serious responsibilities regarding forest management on County Governments which are yet to be set up yet. In the applicant's view, the respondent seeks to remove the forests illegally from the mandate of the county Governments. It is the applicant's opinion that the beneficiaries of the proposed concession are likely to be large companies involved in saw milling which act on business interests and not environmental interests yet the forests proposed to be given out are vital as a source of poles, posts and fuel wood and provide employment and help to alleviate poverty amongst rural populations as well as being a major water catchment area for the country.
5. According to the applicant's legal counsel, the Respondent's actions amount to an abuse of discretion and exercise of powers which the Respondent does not possess and/or are beyond the jurisdiction of the Respondent. To them, the losses in terms of forest cover which are likely to ensure are colossal and totally irreparable and the Respondents have failed to take into account and consider all relevant factors including the views of the Applicant hence the actions of the respondent are oppressive and unconscionable and have been taken without consultation or giving the Applicant any hearing despite several letters done to the Respondent.

RESPONDENT'S CASE

6. In opposition to the application, the respondent filed a replying affidavit sworn by **David Mbugua**, its Director, on 19th September 2012 in which he deposed that the application herein is improper and offends all tenets of good Corporate Governance as the Applicants has a representative in the Respondent's Board and can thus not challenge the Corporate decisions of the respondent, a fact it acknowledges in paragraph 5 of its supporting Affidavit. It is further averred that as conceded in paragraph 7 of its supporting Affidavit the Applicant's members are beneficiaries of Various Forest Management initiatives of the Respondent and can thus not challenge the proposed Concession Agreements. The deponent states that the advertisement that was placed on the Standard Newspaper on 14th June 2012 was merely an expression of interest for the concession of Forest Plantations in various state forests after which respondent thereafter intended to evaluate the "expression of interest" and thereafter call for bids from successful Applicants and it is premature for the Applicants to commence this suit. In his view, the advertisement accorded an opportunity to all Kenyans, the Applicants included and it has not been demonstrated what lose if any the Applicants would suffer if the process were to proceed to its logical conclusion. To him the advertisement was un-equivocal that the concessions being referred to related to Forest Blocks in Mount Elgon, North Rift, Mount Kenya and Aberdares and it invited applications from qualified persons and or entities the Applicants included. Therefore the Respondent contends that it is unfathomable for the Applicants to allege that the Concession units proposed are too big for the applicant's members yet the Concession units range from 1,000 to 4,000 Hectares and 4,000 to 12,000 Hectares. In steering Forest management the Respondent has to ensure that such Management is executed efficiently and economically thus any Concession units less than what is proposed will be uneconomical and will not enhance forest efficiency. It is reiterated that the Applicant's cannot allege to have been sidelined yet they have a representation

in the Respondent's Board. The Respondent stresses that before any concession is awarded the Respondent will place an advertisement on two local daily newspapers with wide national circulation according all stakeholders an opportunity to raise objections thereof.

7. To the deponent, the proposed concession is not unlawful and/or illegal or offensive to the Constitution of Kenya as it is being carried out in accordance with the Forest Rules duly published by the Hon. Minister in accordance with Section 37(2) of the Forest Act hence the entire Application is frivolous and vexatious and purely actuated by Commercial competition and interests and ought to be dismissed with costs.

APPLICANT'S SUBMISSIONS

8. On the part of the applicant it is submitted that under Article 69(1)(d) of the Constitution, the State is enjoined to encourage public participation in the management, protection and conservation of the environment. If the public is to meaningfully participate therein, it is submitted that knowledge is vital. Citing the 1972 Stockholm Declaration, it is submitted that public participation in issues relating to the environment can be conceived not only as a human right but also as a need fundamental to the decision-making process. It is submitted that it is because the Respondent failed in regard to the matter of access to information and public participation that the Applicant has decided to have recourse to the Court. It is submitted that section 3(1) of the ***Environmental Management and Co-ordination Act*** (hereinafter referred to as EMCA) show that this court is empowered to adjudicate on the matter and has wide powers to effect redress.
9. According to the applicant, prior to the impugned decision, there is no evidence at all that the Respondent undertook an Environmental Impact Assessment as required under section 58 of EMCA of 1999. To the applicant, concessioning is clearly a major activity that requires the proponent, in this case the Respondent, to submit an environmental Impact Assessment study and report to enable the authority to determine the effect and impact of the project on the environment and the failure to do so cannot be justified by claims that the Respondent had statutory duty to do what it did.
10. It is submitted that the Respondent being a public body and making decisions with far reaching implications to the rights and legitimate interests of the applicant is subject to the supervisory jurisdiction of the High Court hence the Court should consider the public interest surrounding the decision which outweighs the private interest of the Respondent. Since the remedy of judicial review which is sought in these proceedings is concerned with the reviewing of the decision making process, the Court should ensure that the applicants are given fair treatment by the Respondent. By quashing the Respondent's decision since the authority acted without jurisdiction, exceeded jurisdiction and failed to comply with the rules of natural justice and actually reached a decision that is unreasonable.
11. Based on Articles 47(1)(2) and 50 of the Constitution, it is submitted that the applicants have a right to fair administrative action and that the Constitution entitles the applicants to be given reasons for administrative action that adversely affects their Constitutional rights which reasons must be in writing hence the continued defiance by the Respondents to the constitutional requirements to give written reasons for their inaction is a continued perpetration of an unconstitutional act and should not be left to stand. Relying on **Regina vs. The University Dental Surgery [1993] EWHC**, it is submitted that the only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker who has given no reasons cannot complain if the court draws inference that he had no rational reason for his decision. Based on the same decision it is submitted that the giving of reasons may be inconvenient, but there is no ground at all why it should be against the public interest. It is submitted that there are many valid reasons to justify the giving of reasons one of which is that in order to be acting lawfully, the decision maker must have reasons for the decision and to have to give them is likely to be some assurance that the reasons will be likely to be properly thought out and possibly good in law, for having made them known, the decision will be open to scrutiny. It is therefore submitted that by failing to give written reasons for the proposed concessioning, the Respondent in this case invites the inevitable conclusion that the decision for their inaction is not only bad administratively; it is also unconstitutional and amount to an abuse of discretion and an exercise of powers which the

Respondent does not possess and/or are beyond the jurisdiction of the Respondent. In support of its submissions the Applicants further rely on **Republic vs. National Environment Management Authority & 2 Others ex parte Greenhills Investments Limited & 2 Others [2006] eKLR**.

12. It is further submitted that no representative of the applicant sits on the respondent's board and that. It is further submitted that the Respondent has not provided any information as required under section 40 of the ***Forests Act***, 2005 as to how a decision was reached that the state forests are ripe for concession to private individuals. Relying on section 63 of EMCA, it is submitted that the section makes the undertaking of an Environmental Impact Assessment compulsory prior to concessioning. It is submitted that the Board has failed to put into effect section 8(1) of the ***Forests Act*** because the concessions will jeopardise the very purposes for which the Board is established, namely the sustainable management of forests.

RESPONDENT'S SUBMISSIONS

13. On the part of the Respondent, it is submitted on the authority of **Abdi & 4 Others vs. Minister Office of the President & 2 Others 200 KLR 80** that it is trite law that an Order of certiorari is issued to quash an order already made if such a decision or order is made without or in excess of jurisdiction while prohibition also issue prohibiting a body not to continue with proceedings in excess of jurisdiction or in contravention of the laws of the land. Mandamus on the other hand is remedy compelling a person to perform a duty imposed by a statue which duty he has refused to perform. In support of this submission the respondent rely on **Welamondi vs. the Chairman, Electoral Commission of Kenya [2002] 1 KLR 486**. It is submitted that the Respondent has not acted without jurisdiction or in excess of jurisdiction, does not therefore intend to act in excess of jurisdiction and contravention of the Laws of the land neither has it refused to perform any duty imposed by statute to warrant issuance of the orders of mandamus. It is submitted that since section 7(1) of the Transitional clause the Constitution preserved all existing laws, the applicant cannot allege that Parliament is yet to enact necessary Laws of Management of the environment (Read Forests) whereas there is already in existence The ***Forests Act***, 2005 and the ***Forests (Participation in Sustainable Forest Management) Rules***, 2009 hence the submissions by the applicant alleging non-compliance of the Constitution are misconceived and utterly misguided. To the Respondent, the guiding law on the Management of Forests is in place as the Applicant can only fault the Respondents if they fail to adhere to the same. The Respondents therefore submits that it has not been demonstrated at all that the Respondent has either acted in excess of the Constitution or the ***Forest Act***, a pre-requisite for the grant of writs of certiorari. According to the Respondent, by placing an advertisement in the Daily Nation of 4th June 2012 the Respondent was simply acting within the confines of the Law. It is submitted that section 37(2) of the ***Forest Act***, 2005 mandates the Respondent to provide for community and private sector participation of and in management of State Forest through concession, Joint Management Agreement, permits, licences etc. hence an advertisement in the Newspaper calling for expression of interest is well within the confines of the Law and within the mandate of the Respondent and can thus not be said to be in excess of or lack of jurisdiction and reliance is placed on sections 37(1) and 27(1) of the ***Forest Act***. According to the Respondent, it cannot be said to be acting unreasonably when merely complying with what the Law states as the Forest (Participation in Sustainable Forest Management) Rules 2009 obligates the Respondent once a year to invite persons to prequalify for bidding concessions Agreement and that before doing that the Respondent is required under section 27(2) of the said Act to advertise in two Newspapers of National circulation before inviting a person to pre-qualify.

14. It is therefore submitted that since the applicant cannot be said that it will continue to perpetuate the breakage of the Law, the prayer for prohibition orders must fail. With respect to mandamus, it is submitted that the Respondents have not refused to perform any duty imposed by statute but to the contrary have diligently made efforts to give full effect to the law hence mandamus must similarly fail.

15. It is the Respondent's position that this application has been filed with ulterior motives by agents opposed to full implementation of the new Constitution which accords every Kenyan full opportunities in the utilisation of resources. To the Respondent, the Applicants are opposed to an open competitive and transparent process that will accord equal opportunities to other Kenyans

hence the application is a ploy to achieve those selfish objectives and ought to be dismissed with costs.

DETERMINATION

16. Having considered the foregoing, this is the view I form of the matter.
17. In **Republic vs. The Attorney General & Another ex parte Hon. Francis Chachu Ganya, Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012**, I expressed myself as follows:

"One of the issues raised in these proceedings is that the ex parte applicants were not consulted before the decision affecting them was made. It is not in dispute that under Article 10 of the Constitution the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. It is also true that under Article 10(2) of the Constitution, national values include participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views. This requirement is also to be found in section 13(2)(b) of the *Trust Land Act* which provides that "the Council shall bring the proposal to set apart the land to the notice of the people concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered". In *Republic vs. Ministry of Finance & Another Ex Parte Nyong'o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR 299***, the Court held:**

> **"Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People's participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests."**

Once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made, can nolonger be a subject of judicial review since the decision is nolonger questionable on the process of arriving thereat but can only be questioned on the merits and that is not within the realm of judicial review. In the replying affidavit filed by the interested party there are minutes of meetings involving the local administrative authorities, members of the community, councillors and the interested party. Whereas the adequacy and extent of the participation of the community in the said meetings and in the decision making process may be challenged, that challenge, in my view would go to the merits rather than to the process that was followed."

18. In the preamble to the Constitution the citizens of the Republic of Kenya made it clear that they are respectful of the environment, which is our heritage, and that they are determined to sustain it for the benefit of future generations. In **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258** it was held although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it was fairly possible to do so without violating the meaning of the words used. Since Article 10 does not purport to set out what exclusively amounts to national values and principles of governance it is my view and I so hold that respect and sustenance of the environment is one of the said values and principles and since sustainable development is one of the express values and principles, the Court is enjoined to consider the same in arriving at its decision.

19. That the Respondent did advertise in one of the local print media inviting for expression of interest for concession of forest plantations in state forests is not in dispute. The Respondent has not purported that before it did so it invited public views on the same. However, it is contended by the Respondent that before doing so it was not bound to invite public participation since the act of advertisement does not call for public participation and that it intended to evaluate the "expression of interest" and thereafter call for bids from successful applicants hence it is premature for the applicants to commence the suit. The Respondent has relied on section 37(2) of the ***Forest Act***, 2005. The said section provides:

"Where the Board is satisfied that all or part of the State Forest which is a plantation forest may be efficiently managed through a licence, concession, joint agreement, it may place an advertisement on two Daily Newspapers of National circulation calling for applications from interested persons for the Management of the same."

20. The catchword in the above section is that the Board must be ***"satisfied"***. For the Board to be said to have been satisfied, it is my view that it must consider all the relevant factors. The word "consider" was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."

21. As already held above, the Constitution, the supreme law of the land, enjoins this court to consider the environment in determining this mater. In doing so the issue whether or not the principles of public participation were adhered to by the Board before it became ***satisfied*** that the subject forests may be efficiently managed as provided under section 37(2) aforesaid becomes highly relevant. Therefore, for the Respondent to contend that it was not bound to consider the principle of public participation before being satisfied that section 37(2) aforesaid had been adhered to is, with respect, in my view, a misconception. This is not to say that the court is concerned with the merits of the decision. What concerns the court is the process and once the process is adhered to and a decision arrived at on its merits the court will not interfere unless it is shown that in arriving at the said decision the authority concerned was guilty of abuse of the discretion. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"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 or there was not sufficient evidence to support the decision."

22. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.
23. By purporting to have been satisfied under section 37(2) of the ***Forest Act*** without involving the people, the Respondent denied the people of Kenya an opportunity to make representations on the issue yet it was constitutionally bound to do so. It also denied itself of the opportunity to secure

sufficient material on which it could properly be satisfied that a decision under section 37(2) of the said Act ought to be made. Where the Constitution or an Act of Parliament enjoins an authority or entity to take certain steps before arriving at a decision, and the authority or entity concerned omits to do so, that in my view amounts to acting in excess of its mandate and illegally both of which warrant intervention by way of judicial review. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

24. I am therefore satisfied that the Notice of Motion dated 17th July 2012 is merited.
25. It was however argued that since the concession has not been granted the orders sought herein ought not to be granted as the same are premature. In **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR** the Court of Appeal held *inter alia* as follows:

"Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter…….Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice……..…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice."

26. Whereas an order of prohibition cannot be directed at the decision to advertise for expression of interests, the said order can perfectly be granted prohibiting the Respondent from granting the said concessions.

ORDER

27. Accordingly the orders which commend themselves to me and which I hereby grant are as follows:

1. **An order of certiorari bringing into this court to quash the decision of the Respondent expressed in Daily Nation advertisement dated 14th June 2012 calling for individuals and interested institutions to apply for concessions in state forest plantations, for parcels of between 1,000 – 12,000 hectares each and the said decision is hereby quashed.**
2. **An order of prohibition restraining the Respondent from any further action to actualize the said advertisement**
3. **An order of prohibition restraining the Respondent from granting concessions or alienation of any forest land to any individual or private enterprise and any procurement process that may enhance such actions without following the strict letter and spirit of the Constitution of Kenya and the statutory law.**
4. **There will be no order as to costs in light of the un-controverted averment in the replying affidavit that the applicant's members are beneficiaries of various Forest Management initiatives of the Respondent and have representation in the Respondent's Board.**

Dated at Nairobi this 12th day of June 2013

G V ODUNGA

JUDGE

Delivered in the presence of Ms Odera for the applicant