



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISCELLANEOUS CIVIL CASE 45 OF 2012**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**DICKSON KORIR**  
**ABDI MUJAHID**

**KENYA WILDLIFE SERVICES.....RESPONDENTS**

**-AND-**

**COAST CURIOS BEACH ASSOCIATION.....INTERESTED PARTY**

**RULING**

The application before court filed by Geoffrey Wambua is by way of chamber summons dated 18<sup>th</sup> May 2012. It is an application brought under order 53 of the Civil Procedure rules 2010. He has filed the application on his own behalf and on behalf of the Umoja Watamu Beach Operators Association. It is an association of Beach Operators within the Coastal region. The association seeks the leave of the court to file for Judicial review orders of mandamus certiorari and prohibition. The affidavit by Geoffrey Wambua provides that some of the kiosks of the members of the association were demolished by the respondents following a notice written by a letter dated 10<sup>th</sup> October 2011. It is important to have in mind the contents of that notice because it is the subject of the association's challenge in this matter. That letter is in the following terms:

*Ref: KWS/WTM/709.1*

*10<sup>th</sup> October 2011*

**TO:**

1. *Umoja curio sellers*
2. *Watamu volunteer group*
3. *Watamu youth group*
4. *Mayuja youth group*

5. *Other individual/group conducting business within marine Protected Area*

**REF: QUIT NOTICE**

*This is to bring to your attention the provisions of CAP 376 of Kenya regulations under section 16 regarding conduct of business within the park precincts. Additionally, we further make reference to the streamlining of tourism activities through the recently adopted Management Plan for Malindi Watamu Marine Protected Area, to which you participated.*

*The Kenya Wildlife Service management through this notice is directing you to relocate your business activities and the associated infrastructure (Kiosks/bandase.t.c) to alternative sites outside the confines of Marine Protected Area in the next 7 days from the day of this notice.*

*Failure to abide by this directive will no doubt cause KWS to take any action deemed necessary and appropriate against your inaction.*

*D K Korir*

**Warden – Watamu Marine National Park**  
**CC**

*District Commissioner – Malindi*

*Officer Commanding Police Division – Malindi*

*The Mayor – Malindi Municipal Councillor*

*District Tourism Officer - Malindi*

The Association seeks leave to file for orders of mandamus to compel the respondent to harmonize the rules relating to the marine park to ensure that they comply with the provisions of the Constitution of Kenya 2010 and the Tourist Act Cap 28. They seek orders of certiorari to have the decision contained in the letter reproduced above brought to this court for purpose of quashing. They seek orders of prohibition directed at the respondent to prohibit the respondent from further implementing the decision contained in that letter. The leave sought in respect of orders relating to mandamus and prohibition in my view is merited. The association requires firstly, that Cap 376 (Wildlife Conservation and Management) Act be brought to be in conformity with the Constitution of Kenya 2010. The Constitution being the supreme law of the country requires that all laws do conform to it. The prayer for prohibition would in my view be merited if indeed the court was to find that Cap 376 did not conform to the Constitution.

At the hearing of the application the court requested learned counsel for the applicant to address it on the fact that the order or the decision by the above reproduced letter to which the leave for certiorari is sought was made more than six months prior to the application contrary to Order 53 Rule 2. That Rule provides as follows:

***“2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”***

The date of the above letter is 10<sup>th</sup> October, 2012. The applicant approached the court for leave to file for orders of certiorari on 21<sup>st</sup> May, 2012. Clearly 6 months had long passed.

The learned counsel for the applicant relied on the case **Republic vs Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others Ex-Parte Mwalulu & 8 Others [2004] eKLR**. In that case the

High Court found that the decision of the Judicial Commission of Inquiry into the Goldenberg affairs was amenable to orders of certiorari because the commission by its decision had acted ultra vires. The High court having found that the decision of the commission was ultra vires proceeded to find that the limitation of Order 53 Rule 2 did not apply. It did not apply because the High court stated it had power under section 60 of the repealed Constitution to make orders where there had been excess of jurisdiction. That decision is distinguishable from the case before court. In the present case under section 16 of Cap 376 the Minister has power to make regulations relating to, amongst others conditions, upon which permission to enter a national park may be granted or withdrawn. It would be noted from the letter reproduced above that the notice given to the association to vacate related to vacation of marine protected area.

The applicant by seeking to quash that decision seeking the association to vacate the marine park does not allege that the decision was ultra vires or in excess of the jurisdiction of the respondent. It is on that basis that this case is distinguished from the authority relied upon by the applicant. The applicant in seeking leave to file for certiorari should have complied with the provisions of Order 53 Rule 2 reproduced above. Having failed to do so leave to file for certiorari will not be granted. I might add that the issue of forceful eviction may well be a matter more suited to be litigated in a normal civil action for compensation.

I therefore grant the following orders:

- 1. Leave is hereby granted to the applicant to apply for orders of mandamus as sought in prayer 2 of the Chamber summons dated 18<sup>th</sup> May 2012.***
- 2. Leave is hereby granted to the applicant to apply for an order of prohibition as sought in prayer 4 of the Chamber Summons dated 18<sup>th</sup> May, 2012.***
- 3. The costs of the Chamber Summons dated 18<sup>th</sup> May, 2012 shall be in the cause.***

**DATED and DELIVERED at MOMBASA this 30<sup>th</sup> day of May, 2012.**

***Mary Kasango***

**JUDGE**