



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW 119 OF 2011

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW REMEDY
OF MANDAMUS**

AND

IN THE MATTER OF THE FOREST ACT, 2005

BETWEEN

JOSEPH KAKORE OLE MPOE.....1ST APPLICANT

MARERE OLE PAAN.....2ND APPLICANT

**OLEBIS OLE TIKANI.....3RD
APPLICANT**

FRANCIS ESHO.....4TH APPLICANT

MUSANA OLE MBUKOI.....5TH APPLICANT

**TOMPOKA OLE PALEIYO.....6TH
APPLICANT**

VERSUS

RULING

This Ruling concerns and relates to a Notice of Motion dated and filed 4th November 2011, and seeks an order of mandamus directed to the Respondent, the Kenya Forest Service to permit the Applicants to transport timber and charcoal harvested on the Applicants' farms in the years 2006 and 2007, and said to be lying in their farms.

The application was supported by the ex parte Applicants' Statement of Facts, the Affidavit Verifying the Facts sworn on an unknown date, but probably on 25th October 2011 and the grounds on the face of the Notice of Motion. Counsel for the ex parte applicants also filed written submissions.

The Notice of Motion was opposed by the Respondent who filed grounds of opposition as well as written submissions that the application was bad in law, incompetent and abuse of the process of court, that the matter was *res judicata*, and that the Application offends the provisions of the Forest Act in relation to the duties of the Respondent.

I have read both submissions very carefully along with the authorities cited and attached to the respective submissions. I am however disturbed by one aspect raised by counsel for the Respondent that this matter is *res judicata*, and ought not to have been filed, as it is otherwise an abuse of the process of the court. I will consider these two aspects.

A matter is said to be *res judicata* if the issue at hand has been raised by and between the same parties, and has been adjudicated and determined by a court of competent jurisdiction. That is the effect of Section 7 of the Civil Procedure Act, Cap. 21, Laws of Kenya.

It is acknowledged by counsel for the applicants in grounds of the Chamber Summons dated 25th October 2011 that an application (**No. 31 of 2010 Republic vs. Kenya Forest Service**), for similar orders was dismissed by this court, (*Maraga J as he then was*). The Applicants acknowledged that they had not applied for movement permits, and an order of mandamus could not therefore be ripe.

Instead of appealing against that decision, the ex parte Applicants filed Nakuru C.M.C.C. No. 265 of 2011 wherein the court correctly ruled that it had no jurisdiction to grant the orders of mandamus sought. Frustrated by those orders the applicants have come back to this court seeking the same orders as those they failed to get in Misc. Application No. 31 of 2010, and the outcome of which they failed to appeal against as already observed above.

In his Ruling of 28th June 2010, (in **Republic vs. Kenya Forest Service**) (*supra*), the Hon. Maraga J. as he then was cited with approval the Ruling of Lenaola J. in **WAMWERE VS. ATTORNEY GENERAL [2004] 1 K.L.R. 166** that -

"A public officer cannot be compelled to do something where there was no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal has been shown, it must also be shown to be unlawful."

I entirely agree with the learned judge's view as expressed above. It is correct as counsel for the Respondent have observed in their submissions that permits were granted to the Applicants to harvest some trees, and they did so harvest. There are attached to the Affidavit Verifying the Facts, copies of such permits to so harvest. They are dated 10th May 2007 (*in respect of TOPOIKA PAREIYO*), 7th February 2007 (*in respect of Merere Ole Paani*), 19th July 2007 (*in respect of Francis H. Esho*) and 13th March 2008 (*in respect of Joseph Mpoe*). There no such permits to harvest in respect of Olebis Ole Tilkani, Musana Ole Mbukoi, and Tompoka Ole Paleiyo. They cannot therefore claim that they have been denied permits to remove the forest products.

Further, even if these latter had permits to fell the timber the trees like the other three, none of the Applicants have demonstrated that they have applied for such movement permits and have been denied. It is a prerequisite for an order of mandamus to issue for an applicant to show that a public officer invested with a public or statutory duty has failed to perform such duty. All that is attached are copies of correspondence to various bodies like the Minister for Forestry and Wildlife, the Provincial Commissioner, Rift Valley, and Permanent Secretary of the Ministry responsible for forestry and Wildlife. There are no copies of applications for permits to remove the forest products. There is no correspondence indicating refusal by the relevant office of the Kenya Forestry Service. There is consequently no basis for granting the prayers sought.

The inevitable conclusion is that the application is incompetent and is, in so far as a similar application was filed and dismissed, an abuse of the process of court.

This is not to say that the ex parte Applicants have no grievance. They do, but they are addressing it at this stage to a wrong forum.

For those reasons, the Notice of Motion dated 4th November 2011 is dismissed with a direction that each party bears its own costs.

It is so ordered.

Dated, signed and delivered at Nakuru this 22nd day of June, 2012

M. J. ANYARA EMUKULE
JUDGE