



REPUBLIC OF KENYA

High Court at Kitale

Miscellaneous Civil Application 4 of 2012

REPUBLIC.....APPLICANT.

VERSUS

THE DIRECTOR, KENYA FOREST SERVICE

THE ZONAL MANAGER, MARKWET ZONE

THE ATTORNEY GENERAL..... RESPONDENT

R U L I N G.

This is essentially a judicial review matter brought under section 8 and 9 of the Law Reform Act and Order 53 Rules 1, 2, 3 & 4 of the Civil Procedure Rules.

Necessarily leave under Order 53 Rule 1 CPR was granted on the 24th January, 2012. the present substantive application by way of the Notice of Motion dated 30th January, 2012 was filed on the same day.

The order being sought by the applicant is that of Mandamus, to compel the first respondent (**Director, Kenya forest Service**) to issue authority to harvest and transport timber/posts and/or movement permit to the applicant.

In his supporting grounds, the applicant states that he is a timber trader and has purchased timber and posts for transportation and that he has duly complied with all regulations pursuant to the Forest Act but the first respondent has failed to give the necessary authority and failed to give credible reason for the failure to issue the authority and/or movement permit.

The application is accompanied by a supporting affidavit dated 30th January, 2012 which merely exhibits the leave order made on 24th January, 2012, the verifying affidavit dated 19th January, 2012 and the statement of particulars dated 19th January, 2012, all in support of the application for leave. Both verifying affidavit and the statement of particulars should have accompanied the Notice of Motion and be served together with the notice rather than being mere annexures to a supporting affidavit which was completely unnecessary.

Copies of the statement of particulars and verifying affidavit are normally served with the Notice of Motion as provided by Rule 4 (1) of Order 53 CPR.

The statement of facts and particulars is required to set out the name and description of the applicant, the relief sought and the grounds on which it is sought. The affidavit is for purpose of verifying the facts

relied on by the applicant. Herein, the statement of particulars dated 19th January, 2012 leaves a lot to be desired in terms of form. Nonetheless, it may together with the verifying affidavit dated 19th January, 2012 be treated as the documents setting out the grounds in support of the Notice of Motion. By so doing, the court is merely attaching more importance to the substance of the application rather than its form.

Be that as it may, the scope and efficacy of an order of mandamus is stated in the **4th Edition Vol. 1 of Halsbury's Law of England at Pg. 111** in the following terms:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Further:-

“The order must command no more than the party against whom the application is made is legally bound to perform.

Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty in the hands of the party on whom the obligation is laid, a mandamus cannot commend the duty in question to be carried out in a specified way.”

The foregoing principles were considered by the Court of Appeal in the case of **Kenya National Examinations Council vs. Rep. Ex-parte Geoffrey Gathenje Njoroge & others (1997) eKLR** where it was stated that the principles mean that an order of Mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

It was further stated in the same case that the High court cannot through mandamus, compel a licensing body to either grant or refuse to grant a licence where the power to grant or refuse a licence is visited in the licensing body. In that case, the licensing body involved was the liquor licensing court whose power to perform its public duty was denied from the liquor licensing Act.

In this case, the body involved is the first respondent, Kenya Forest Service whose power to perform its public duty is imposed on it by the **Forest Act, 2005** and in particular **The Forests (participation in Sustainable Forest Management) Rules, 2009** i.e. Legal Notice No. 165 of the 6th November, 2009.

The applicant argues that he has purchased timber and posts which he desires to transport and has in that regard applied for the necessary movement permit in accordance with applicable regulations made under the Forest Act. However, the first respondent has declined to issue a permit despite communication from the second respondent (The Zonal manager, Marakwet Zone) that there is no objection to the transportation.

The applicant has exhibited a sale agreement (annexure marked "PGM 1" showing that the purchased timber from one Ruto Rotich for the purposes of facilitating payment of his (Ruto's) medical expenses.

Also exhibited (see, annexure marked "PGM 4") is a certificate of origin for farm forest produce issued to the said Ruto Rotich by the Ministry of Forest and Wildlife dated 18th August, 2011. there is also a letter dated 28th October, 2011 to the first respondent by the second respondent (see, annexure marked (PGM 5 (b) recommending grant of authority to harvest and transport timber/posts.

None of those documents refer to the applicant herein. They refer to the said Ruto Rotich and other farmers. The authority sought from the first respondent was for harvesting and/or transportation of timber and/or posts and was so sought by the second defendant on behalf of the said Ruto Rotich and others who did not include the applicant herein.

Indeed there is nothing in the supporting documents showing that the applicant in his own right applied for any authority or a movement permit from the first respondent and even from the second respondent. For all the foregoing reasons, this application is unsustainable, misconceived and at most, an abuse of the court process. The applicant cannot seek to obtain from this court what he has not in the first place attempted to obtain from the appropriate public body. (i.e. the first respondent) in accordance with the prescribed rules contained in Legal Notice No. 165 of 16th November, 2009. there has been no refusal by the first respondent to perform its public duty at the instigation of the applicant.

This application is lacking in merit. It must and is hereby dismissed with costs to the respondents.

[Read and signed this 18th day of October, 2012.]

[In the presence of Mr. Sifuna for respondent and M/s. Arunga for applicant.]

J.R. KARANJA.

JUDGE.