



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 96 OF 2010

GERALD WANJOHI.....1ST APPLICANT
MARGARET W. GATHAGA.....2ND APPLICANT

VERSUS

THE DISTRICT FOREST OFFICER
KOBATEK DISTRICT.....RESPONDENT

JUDGMENT

By the Notice of Motion dated 13/10/2010, the ex parte applicants Gerald Wanjohi and Margaret W. Gathaga seek the following orders against the District Forest Officer Koibatek, District:-

- 1. That this Honourable Court be pleased to issue an order of certiorari to remove to this Honourable Court and to quash the decision of the respondent of 22nd September 2010 and confirmed by the same said respondent in his letter dated 23rd September 2010;***
- 2. That this Honourable court be pleased to issue an order of mandamus directed upon the respondent compelling him and ordering him to forthwith release to the applicants motor vehicle (lorry) Registration No. KAR 169B together with its cargo of 161 cypress beams.***

The Notice of Motion is predicated on the statement of facts dated 11/10/2010 and the verifying affidavit sworn by Margaret Gathaga on the same date. The applicants' counsel, Mr. Karanja Mbugua also filed submissions and a list of authorities on 15/12/2010. The application was opposed and a replying affidavit was sworn by Anthony K. Musyoka, the Zonal Manager, Koibatek Forest Zone under the Kenya Forest Service with authority of the Board of Directors.

The issues that seem to arise and which require determination are:-

- (1) whether the respondent acted in excess of its jurisdiction;***
- (2) Whether the applicants were denied the right to be heard;***
- (3) Whether the respondents have acted irrationally or in bad faith;***
- (4) Whether the orders of Judicial Review are available.***

The applicants' case as can be deduced from the affidavit of the 2nd applicant and statutory statement is that the 2nd applicant purchased 161 cypress beams from two people who had obtained authority to fell trees from the relevant authority – certificates was issued to one Julius Rono owner of LR. No. 296 Kamaara Village from the Forest Officer Olenguruone dated 13/9/2010 which copy was exhibited as MWG II. An application form filled by Kenya Forest Service in favour of the said Rono where the applicant was reflected as the purchaser (MWG III), dated 24/8/2010. Lastly an application for authority

to fell trees was issued to Margaret Tabsabet and the applicant was reflected as purchaser. It is dated 22/7/2010 (MWG IV). After the trees had been cut, the 2nd applicant hired the lorry, the subject of these proceedings, KAR 169B, from the 1st applicant (MWG(V)). The 1st applicant was issued with a Forest Produce Movement Permit on 21/9/2010 valid till 23/9/2010 (MGW V). The applicants exhibited certificate of registration of the vehicle from Kenya Revenue Authority (MWG VII), which does confirm that the 1st applicant is the registered owner of the lorry. The lorry driver and loaders were dispatched to go and get the beams on 22/9/2010 to Kitui through Eldama Ravine Road but along Maji Mazuri-Eldama Ravine Road, the respondent's officers impounded the said lorry and confiscated the documents and the beams. The respondent then addressed the letter dated 23/9/2010 to the Resident Magistrate, Eldama Ravine. It is the applicants' contention that the respondent acted in bad faith by denying the respondents a hearing. The applicants' counsel urged the court to look at the process. Counsel relied on the cases of **SAMUEL SANKOK V KFS, NKU 141/08, IMBOGO V KENYA SUGAR BOARD [2007]1 EA 92; KIAMBAKI V GICHOHI MACHARIA, CA 78/02 NRB HCC 818/1992, BOARD OF GOVERNORS PANGANI GIRL'S SCHOOL V ELIZABETH WAINAINA.**

In opposing the application, Anthony Musyoka deponed that the story in the applicants' affidavit is not factually correct as one cannot move from Molo to Eldama Ravine and do same things during two consecutive days using the same permit. The respondent inferred fraud on the part of the applicants whose lorry was intercepted at 2.00 a.m. as evidenced by the seizure notice addressed to the court and which was issued in compliance with the respondent's statutory powers. According to the deponent, the driver and loaders escaped (fled) when they were stopped and the lorry had to be towed to their office. He also deponed that upon inspection of the trees, they were found to be from the forest but not from individual owners. Instead of the beams being 4 tones as per the permit, they were 6 tones. He denied that the same materials would have been loaded on 21st and 22nd October 2010. He added that the warder who had supervised the permit and loading on 21/10/2011 was ready to give evidence. It is the respondent's contention that the applicants should have gone to offer their explanation and presented the documents they have exhibited in this matter to the respondent instead of coming to court. It is further contended that the move to court is to preempt criminal charges. Mr. Kipkoech urged that no decision that can be subject of certiorari has been made because **Section 50** of the **Forest Act** empowers the respondent to detain a vehicle for purposes of investigations. Counsel generally agreed with the principles espoused in the authorities cited but denied that the facts in those cases were similar to the instant case.

Having considered the affidavits filed by the respective parties, rival arguments and authorities, I wish to point out that there is disconnect in the applicants' case. From the time the lorry and its load was intercepted, the applicants do not state exactly what happened. The applicants claim to have been denied a hearing but the respondent contends, which is not denied, that the lorry driver and the loaders escaped and after that the lorry was towed to the respondent's offices nobody has gone there to claim them. How did the applicants expect to be accorded a hearing without presenting themselves to the respondent's officers? Rules of natural justice could only be observed when the applicants presented themselves to explain why the lorry was found in Eldama Ravine allegedly from Molo, carrying a load of 6 tones instead of 4 tones at 2.00 a.m. There would have been nothing easier than the applicants presenting the documents which they have now produced in court in support of their case.

It is apparent that the facts herein are disputed. Firstly, whereas the applicants claim that the beams that were being ferried were from individual farmers, the respondents are of the view that the beams are from a forest; secondly, the applicant named two persons (i.e. Julius Rono and Mary Tabsabet) named in the permits as the persons from whom she bought the beams. The said people never swore any affidavits to confirm that they sold the said beams; Thirdly, whereas the applicants claim that the driver used a long route from Olenguruone to Eldama Ravine in order to go to Kitui, it is the respondent's contention that the beams were from Koibatek and there is no possibility of using such route from Molo. This is just to name but a few of the disputed facts. **Michael Fordam in his Book, Judicial Review Handbook 5th Ed.** States that Judicial Review has often been said to be unsuitable for deciding disputed facts and fact adjudication alternative remedy is preferred. I do find that this is a matter that cannot be resolved by way of Judicial Review on affidavit evidence. There are many gaps, unanswered questions and disputed facts that can only be clarified at a hearing with witnesses being cross examined or either the applicants being subjected to investigations undertaken by the respondent. I am persuaded to agree with the respondents

that the applicants are taking a short cut by seeking Judicial Review orders instead of reporting to the Forest station where their goods were impounded for investigations. They have come to a wrong forum.

The applicant alleges that by detaining the vehicle and beams, the respondent acted in excess of jurisdiction and they sought to have quashed, the seizure and detention notice addressed to the Resident Magistrate's court Eldama Ravine. **Section 50** of the **Forest Act (2005)** gives powers to forest officers to enable them enforce the Act. **Section 50 (1)A** of the **Forest Act** (see (d) under which the letters were addressed reads as follows:-

“A forest officer may –

(a) demand from any person the production of an authority or licence for any act done or committed by that person in a state, local authority or provisional forest, or in relation to any forest produce for which a licence required under this Act or under any rules made thereunder;

(b) require any person found within or without a state, local authority or provisional forest who has in his possession any forest produce suspected to have been taken from such forest, to give an account of the manner in which he became possessed thereof, and, where the account given is not satisfactory, arrest and take such person before a magistrate;

(c) search any person suspected of having committed an offence under this Act or of being in possession of any forest produce in respect of which an offence has been committed, and arrest the person, seize and detain any baggage, package, parcel, conveyance, tent, but or building under the control of that person or his agent or servant:

Provided that no person shall be arrested under this section unless the forest officer has reasonable cause to believe that that person may fail to appear to answer a summons, or unless that person refuses to give his name and address or gives a name and address which there is reasonable cause to believe is false;

(d) may search any vehicle or vessel and seize and retain any forest produce in respect of which there is reason to believe that an offence has been committed, together with any tools, equipment, vessels, vehicles, or livestock used in the commission of the offence.

Provided that the Forest Officer seizing such property shall forthwith report the seizure to the magistrate having jurisdiction over the area where the offence takes place.”

The respondent acted within the provisions of the law by seizing and detaining the vehicle and beams on suspicion of commission of an offence. The notice to the magistrate was made and issued within the law and the same cannot be faulted. It was the duty of the respondent to take possession of the vehicle and beams which were left behind by the fleeing driver and loaders, to enable them investigate the source of the beams and determine whether the process by which they were acquired was lawful. There is not a shred of evidence to show that the respondent acted outside their mandate under **Section 50** of the **Forest Act (2005)**. The respondent could not give the applicants a hearing when they were nowhere to be found.

Whether the respondent's decision is irrational or made in bad faith, one is said to act in bad faith if he acts vindictively or abuses the powers conferred on him by statute contrary to the public good. Again the applicants have not demonstrated that the respondent acted in bad faith. If anything, the conduct of the applicants is questionable. The lorry was stopped at 2.00 a.m. The driver and loaders fled and from 23/9/2010, without reporting to the Forest Officer who impounded the lorry, the applicants came to this court on 12/10/2010 to obtain orders against the respondent; instead of the vehicle travelling from Molo towards Kitui, it was in Eldama Ravine. The applicants conduct raises eye brows. I find no proof of bad faith on the part of the respondent. After impounding the vehicle, the respondent immediately reported to the magistrate as required by law.

An order of certiorari will lie from the High Court to quash a decision of a lower court or tribunal if the

decision making body acts in excess or without jurisdiction, or if it acts in breach of rules of natural justice. The applicants have not demonstrated that they are entitled to the said order.

An order of mandamus is an order issued by the High Court to an inferior court or tribunal, in the form of a command, to perform a statutory duty which it has ignored or neglected to perform. In the case of **JOTHAM MULATI WELAMONDI V ECK Misc. App. No. 81/02**, the court said thus of an order of mandamus:-

“Mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant.”

The applicants have not pointed to any duty that the respondent has failed to perform. There is no statutory duty imposed on the respondent to release the lorry and the beams.

Judicial Review remedies are discretionary in nature and the court considers all the circumstances surrounding the particular case before it can grant them. The **SUPREME COURT PRACTICE RULES 1997 VOL. 53/1-14/14** states as follows:-

“Even if a case falls into one of the categories where Judicial Review will lie, the court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case.”

In the instant case, even if the orders had been deserved the conduct of the applicants would not have been ignored. They did not come to court with clean hands. For all the above reasons, I decline to grant the orders prayed for. I dismiss the Notice of Motion dated 13/10/2010. The applicants will bear the costs of this application.

DATED and DELIVERED this 18th day of March 2011.

**R.P.V. WENDOH
JUDGE**

PRESENT:

N/A for the applicants.

Mr. Kipkoech for the respondents.

Kennedy – Court Clerk.