



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSTITUTIONAL APPLICATION NO. 45 OF 2011

VICTOR LAGAT:::1ST APPLICANT
ISAACK KIPKOGEY:::2ND APPLICANT

VERSUS

REPUBLIC:::RESPONDENT

JUDGEMENT

By their Originating Notice of Motion lodged on 2nd June, 2011, **Victor Lagat** and **Isaack Kipkokey** (hereinafter “**the applicants**”) moved the court seeking the following principal remedies under Rules 1 & 2 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of rights and freedoms of the individual) High Court Practice and Procedure Rules 2006).

- (i) That the charge registered in Iten SRMC CR Case NO. 314/2011 against the applicants be nullified.**
- (ii) That in the alternative this court do call for the file in the subordinate court at Iten SRMC Criminal Case No. 314/2011 for purposes of making orders that would serve the interests of justice.**
- (iii) That the OCS Iten Police Station be ordered to release motor vehicle registration No. 495E plus all the timber to the applicants.**

The application is made on the grounds that the applicants had a valid permit to transport the seized timber; that the applicants have committed no offence, that they stand to suffer irreparable loss and their rights violated if they tried and that this court has the jurisdiction and power to uphold the rights and freedoms of the individual including the applicants.

The application is supported by an affidavit sworn on 2nd June, 2011 by the 2nd applicant. The 1st applicant has also supported the application by his affidavit sworn on 16th June, 2011. There is also a further affidavit sworn by the 2nd applicant on 16th June, 2011. Their case, as can be gleaned from those affidavits, is that on 24th May, 2011, they were arrested as they ferried timber on motor vehicle Registration Number KBE 495E along Kittany/Eldoret road ostensibly because they did not have the requisite permits. They were then, arraigned before Iten Court in the said case and charged with being in possession of Forest Produce Contrary to Section 52(1)(9) as read with Section 52(2) of the Forest Act No. 7 of 2005. Yet they had the requisite permit. They therefore content on advice of their counsel that their right and freedom to engage in legitimate business has been violated; that the charge as presented

does not disclose an offence and that the said case should be declared a nullity.

The applicants have supported their case with several annexures including a copy of a Forest Produce Movement Permit dated 24th May, 2011, issued by the District Forest officer - Keiyo South District.

The respondent is described as the Republic. It has opposed the originating Notice of Motion through two affidavits. The first one is a replying affidavit sworn on an unknown date by Forest Ranger, **Sammy Ngeny** and the second one is a further replying affidavit sworn by the same ranger on 15th June, 2011. The gist of the opposition is that the applicants were arrested as alleged because they were ferrying forest produce on the said road on the authority of a permit dated 23rd May, 2011, issued by the District Forest Officer Bungoma which permit only authorised ferrying produce from Tongaren to Eldoret. *Mr. Ngeny* has sworn that the permit now exhibited by the applicants was never shown to him, at the time of the applicant's arrest and that in any event the same is not in the names of the applicants. To buttress his averment he has annexed copies of both permits.

The originating Notice of Motion was canvassed before me on 16th June, 2011, by **Mr. Limo** Learned Counsel for the applicants and **Mr. Chirchir** Learned Senior State Counsel who represented the Republic. Counsel reiterated their clients stand points taken in their respective affidavits. For the applicants it was emphasised that Article 165 (3) of the Supreme Law gives the High Court Jurisdiction to given the reliefs sought in the motion otherwise the applicants' rights under Article 50 (1) will be infringed.

On his part Learned counsel for the Republic saw no such infringement in the arrest and subsequent arraignment of the applicants before Iten Court. In his view their was and there is basis for the actions, by the State. He referred to the permits upon which the applicant's base their Originating Notice of Motion and submitted that the same are in the names of a party who has not been charged.

I have considered the Originating Notice of Motion, the affidavits filed and the submissions of counsel. Having done so, I take the following view of this matter. From the outset, I agree that the High Court, as established under the constitution, is vested with the authority to uphold and enforce the Bill of Rights. Article 23(1) is in the following terms:-

“23(1) The High court has jurisdiction in accordance with Article 165 to hear and determine Applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”

And article 165 (3) (b) reads as follows:-

“ 165 (3) Subject to clause (5), the High Court shall have:-

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

The applicants contend that they have committed no offence and should therefore not be subjected to prosecution over an act that is clearly licensed. The intended prosecution, according to the applicants, will infringe on their rights to engage in legitimate business.

So, two fundamental freedoms are identified by the applicants as being threatened with infringement by the intended prosecution; their personal freedom and security and the protection of rights to property (Articles 29 (a) and 40 (1) of the constitution).

The enjoyment of those rights is however not absolute. The Constitution itself provides for situations when their enjoyment may be limited. Article 24 (1) provides as follows:-

“24. A right or fundamental freedom in the Bill of Rights shall not be limited except by Law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic

society based on human dignity, equality and freedom, taking into account all relevant factors, including:-

- (a) *The nature of the right or fundamental freedom;***
- (b) *The importance of the purpose of the limitations;***
- (c) *The nature and extent of the limitation;***
- (d) *The need to ensure that the enjoyment of rights and fundamental freedoms by any individual, does not prejudice the rights and freedoms of others; and***
- (e) *The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”***

The applicants were arrested on suspicion of ferrying forest produce without a permit - from the forest Conservator. The learned Senior State Counsel contends that the suspicion was not without basis because indeed, when the applicants were arrested, they had no valid permit and that upto the time of canvassing this application, no permit in the names of the applicants had been exhibited. That argument is not without substance given that the mainstay of the applicants' case is exhibit "IK 5" which is a Forest Movement Permit dated 24th May, 2010 issued by the District Forest Officer- Keiyo South District. That permit was issued to one **Samwel Kiprop**. However, **Samwel Kiprop** is not charged with any offence.

When the applicants were arrested, they were arraigned before Iten Court without delay. Iten Court then, in accordance with Article 49 (1) (h) of the Constitution, released them on bond pending trial. There is no suggestion that the applicants are apprehensive that they may, not have a fair hearing before the said court as required by Article 50 of the Constitution.

I should be careful not to comment on the evidence which is likely to be adduced at the trial. However, on the material availed to the Court, I am unable to find, as of now, that any right and freedom of the applicants, as guaranteed under the Constitution, have been infringed. There is no suggestion that the applicants have lost their right to be presumed innocent until the contrary is proved (See Article 50 (2) (a) of the Constitution). However, the strength of their case should not be the basis of a complaint under Article 22 and 23 of the said Supreme Law.

Suspected contravention of the Law attracting penal sanctions in my view would found basis for limiting enjoyment of the rights or the freedoms the applicants allege have been threatened with infringement. If it turns out that the State has no basis of prosecuting the applicants, they are not without a remedy. They will be at liberty to seek damages for unlawful arrest and malicious prosecution. My findings herein are not also a bar to the applicants later revisiting the issue of breach of their rights and fundamental freedoms under Article 23 and obtain an order for compensation for such breach.

In the end and for the above reasons, the applicants' Originating Notice of Motion dated 2nd June, 2011 is dismissed.

Each party shall bear its own costs.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 30TH DAY OF JUNE, 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

- (1) Mr. **Limo** for the applicants and
- (2) Mr. **Oluoch**, Senior Deputy Prosecution Counsel for the State.

**F. AZANGALALA
JUDGE.**

30TH JUNE, 2011