



REPUBLIC OF KENYA  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 370 of 2008**

**WILFRED SAMSON MUTUA .....PLAINTIFF**

**VERSUS**

**KENYA WILDLIFE SERVICE .....DEFENDANT**

**RULING**

The notice of motion about to be determined was brought by the defendant parastatal on 26.11.09. It was brought under section 3A, 6 Civil Procedure Act with powers donated by Order 50 Rule 1 Civil Procedure Rules. The main prayer therein was that:

1) that be stay of proceedings in the suit herein pending the hearing and final determination of CIV APPEAL NO. 150/06

When Mr. Lutta was about to put his arguments it was brought to his attention that the appropriate statutory provision he should have cited with heading of his motion was Order 41 Rule 4 Civil Procedure Rules. Accordingly, the court incorporated that provision in the proceeding.

The grounds in the body of motion and which Mr Lutta argued were that the plaintiff/respondent once filed a judicial review application – MISC APPLICATION No. 1287/05 in this court seeking orders of certiori and prohibition. Certiorari order centred around a decision/letter dated 1.08.05 by the defendant terminating the plaintiff contract of service while a prohibition order was to be directed to the defendant not to put into effect the termination. The application was heard and dismissed by Wendo J on 24.3.06. Aggrieved by that decision the plaintiff lodged C.A. 150/06 aforesaid which is still pending.

The applicant's view was that the plaintiff then brought this suit on 15.8.08 claiming that by the letter from the defendant dated 1.08.05, terminating his employment constituted wrongful dismissed and so he prayed for general damages in that regard. Counsel posited that because the two causes based on the same letter of 01.08.05 were set to go on in the Court of Appeal and in this court at the same time in the event of each court arriving at a different decision that would constitute a conflict which goes contrary to public policy. Thus the applicant sought the proceedings in that suit to be stayed so that after the appeal has been determined, then the plaintiff will decide what to do with this case. The applicant was not asking that it be struck off – only to be

stayed or held in obedience pending the outcome of the appeal. It was thrown in that the plaintiff's actions were vexations and an abuse of the process of court – an aspect this court was not inclined to accept presently.

Mr Kuloha opposed the motion as per the grounds filed and even without a replying affidavit, the court allowed him to comment on the merits of the motion.

Counsel began by impeaching the competence of one Thomas Ogola, a principal legal officer of the applicant to swear that supporting affidavit. To him that militated against section 3B (7) of the wildlife (Conservation & Management) Act (Cap 376), the Act. Reading of that provision of law gave Mr Kuloha space to argue that the said legal officer had no authority to do acts like swearing affidavits in the matters where his employer the defendant was concerned, save by authority of the employer's management board. He was not an authorized agent of the corporation (see order 3 Rule 2 ( c) Civil Procedure Rules) and with that the supporting affidavit in question should be struck out and the motion dismissed. And the case of Zipporah Nyahando Vs Barclays Bank of Kenya KISII HCCC 34/08 was cited on that point.

The court heard that the judicial proceedings review were rooted in the Law Reform Act (cap 26) while this suit was brought as provided for by the Civil Procedure Act and Rules there under. Accordingly each proceeding could competently be pursued independently and separately from the other without prejudice, conflict or other and even side by side. Mr Lutta's claim that if the courts gave conflicting decision on this one letter of termination it could spawn a judicial conflict, all contrary to public policy, Mr Kuloba termed such an out-come as mere conjecture and urged this court to let his client move on with proceeding for damages here as well as his appeal on judicial review in the Court of Appeal.

We begin with S. 3 B(7) of the Act reads:

3B. (1) ..... (6) .....

(7) The quorum necessary for the transaction of the business of the Board shall be seven trustees inclusive of the person presiding; and all acts, matters or things authorized or required to be done by the Board shall be affected by a resolution passed by a majority for the members present and voting at a meeting at which there is a quorum.”

(8) ..... (10) .....|”

This provision of law falls under PART II of the Act headed – ADMINISTRATION. In the amendment by Act no. 16/1989 under this part, a uniformed and disciplined service called the Kenya Wildlife Service was established with its head office in Nairobi, its functions and to be managed by a Board of trustees (S.3B.) It is that Board to manage the service whose quorum is set by S. 3 B. (7) of the Act.

Having appreciated this section as well as it was possible this court was unable to accept that it encompassed the activities of a principal legal officer of the defendant eg in swearing affidavit in matters affecting it. In this court's view an affidavit is evidence on oath. Evidence is basically composed of facts. And whoever is seized of facts on a given subject is competent to put them forth. Thus no reason has been shown to expunge the supporting affidavit herein from the record. The said legal officer deponed that he was an officer of the defendant competent to swear on the facts he did and so be it.

Coming to the merits of this motion, this court has no doubt that the judicial review process the plaintiff commenced as was his right to do is still on course after the High Court dismissed the initial application. He ..... his way to the court of Appeal and lodged the appeal against the High court decision that is his right and the appeal is pending. The cause plaintiff is pursuing is that the High court declined to quash the letter terminating his services to the defendant. In the event the court of Appeal agrees that that decision was not according to the

Law, procedure or rules of natural justice etc it will quash the decision to terminate the plaintiff's service, putting him back in the state he was in before 01.08.05.

The pursuit for damages in the suit herein is also centered round the same Termination letter. In the event the plaintiff is successful here ie. that his dismissal was wrongful he will be awarded damages.

No one is claiming that the 2 proceedings are under different legal regimes or that they cannot proceed concurrently. The point is up to this point no one can say which cause will be determined first and with – what result. Just by way of conjecture as Mr Kuloba put it, the court of appeal found that the decision to fire the plaintiff was not lawful and the High court in a letter decision found that the termination was lawful and awards damages? For the sake of judicial jurisprudence and public policy what will be the decision to implement? In such circumstances, this court is indeed to conclude and it concludes that for consistent of judicial decision and applicability of the same, the proceedings before the two courts follow each other in conclusion. The applicant is not asking this court to strike out or dismiss the plaintiff's case here. Only to stay it. True, the C. A No. 150/06 does not arise directly from this cause. But in the circumstances of the overlap over one and the same letter of termination being the basis in the judicial review cause and this suit, it is ordered that proceedings herein be stayed awaiting the outcome of the C.A 150/06. Each party to bear its own costs.

Orders accordingly.

Delivered on 23.3.10.

J. W. MWERA

JUDGE