



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Judicial Review 31 of 2010

JUDICIAL REVIEW

***When mandamus can be refused
*Rules of Natural Justice to be followed**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS AND
PROHIBITION**

AND

IN THE MATTER OF THE FOREST ACT, 2005

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA FOREST SERVICE.....RESPONDENT

EX-PARTE APPLICANTS

**JOSEPH KAKORE OLE MPOE.....1ST SUBJECT
MARERE OLE PAAW.....2ND SUBJECT
OLEBIS OLE TIKANI.....3RD SUBJECT
FRANCIS ESHO.....4TH SUBJECT
MUSANA OLE MBUKOI.....5TH SUBJECT
TOMPOKA OLE PALEIYO.....6TH SUBJECT**

RULING

This is an application for the Judicial Review orders of mandamus and prohibition. The ex-parte applicants claim in their Notice of Motion dated 1st March 2010 and brought under **Order 53 Rule 3(1)** of the **Civil Procedure Rules** and **Sections 8 and 9** of the **Law Reform Act** that they are farmers and members of Olosho Onyok Community Forest Association authorized under **Section 46** of the **Forest Act** to assist in the environment conservation and management of the forests in their area and also to assist the Maasai Community to adopt agriculture as a source of livelihood.

To engage in agricultural activities, they separately bought their respective pieces of land and cut the trees growing on them to clear the ground for cultivation. Despite obtaining Certificates of Origin for Farm Produce and Forest Produce Movement Permits in 2006 and 2007 which have

now expired, the Respondent has refused to consider their applications for fresh Movement Permits citing the general ban on logging it issued in the year 2008. Instead the Respondent's Forest Officers are harassing them by seizing and selling their produce.

The Applicants therefore seek an order of prohibition to prohibit the Respondent's Forest Officers from invading their private land, harassing them and or illegally confiscating their produce lying on their farms. They also seek an order of mandamus to compel the Respondent to consider their applications for Forest Movement Permits to transport the timber and charcoal they harvested in 2006 and 2007 now lying on their farms. They claim that the Respondent's failure or refusal to consider their applications has occasioned and continues to occasion them colossal loss.

In their submissions counsel for the ex-parte Applicants accuse the Respondent of breaching the rules of natural justice and being guilty of procedural impropriety, acts that they term ultra vires. They argue that the Respondent being the body authorized to issue Forest Produce Movement Permits is under duty to consider the Applicants' applications but it has refused to give them audience, their letters to the Respondent having not elicited any response. On procedural impropriety they submitted that pursuant to **Section 46(2)** of the **Forest Act** the Applicants indicated in their initial applications that they were clearing their lands for agriculture (Agroforestry) hence not in conflict with conservation of biodiversity and that is why they were issued with Certificates of Origin for Farm Forest Produce and Forest Produce Movement Permits in 2006 and 2007. Citing the case of **Sea Star Malindi Ltd Vs Kenya Wildlife Service KLR (E & L) 1512** in which it was held that "the decision by KWS restricting, banning and/or restraining the applicant from constructing a hotel, on its parcel of land in accordance with the building plans approved by Malindi Municipal Council was ultra vires" counsel argued that it is procedural impropriety for the Respondent to refuse to consider the applicants applications for new Movement Permits. They said it is also ultra vires its powers for the Respondent's officers to harass the Applicants. For those reasons they urged me to allow the application and grant them the orders of mandamus and prohibition as prayed.

In response to Respondent filed grounds of opposition that this application is incompetent, inept misconceived and therefore bad in law as it offends the provisions of the **Forest Act**.

Expounding on these grounds, counsel for Respondent submitted that this application is incompetent and bad in law as it has been brought in the same file in which leave was sought and granted. In their opinion the substantive application should have been brought in a separate file. That having not been done, they submitted that this application is fatally defective. They cited the case of **Republic Vs Funyala Land Dispute Tribunal & 3 Others [2004] 1 KLR 585** in support of that contention.

Counsel also cited **Section 46** of the **Forest Act** and dismissed the Applicants as individuals bent on personal gain and not conservationists as they claim. They argued that the Respondent

is, not under any public duty to consider or issue the Applicants with movement permits. In any case they further argued that the Applicants have not shown proof that they applied for such permits. Citing the case of **Wamwere Vs Attorney General, [92004] 1 KLR 16b**, they argued that mandamus cannot issue unless there is proof of an application which has not been considered or refused.

As regards the order of prohibition, counsel said it does not lie in the circumstances of this case. As the Respondent is a body corporate capable of suing and being sued, as stated in **Section 4(2)(a)** of the **Forest Act**, they said the Applicants should have sued it if they felt aggrieved.

I have considered these submissions and read the authorities cited. I find no merit in the contention on behalf of the Respondent that this application is incompetent or fatally defective because it has been brought in the same file in which leave was sought and obtained. I cannot, on my part, find any warrant in **Order 53 Rule 3(1)** or in any other **Rule** of that **Order** for that proposition. If anything bringing the substantive application in the same file in which leave was obtained give the court with the history of the matter. In the circumstances I find this application is competently before court.

I agree with counsel for the Applicants that the most revered rule of natural justice is ***“audi alteram partem”*** which literally means hear the other side. This doctrine is well elaborated in **Poshito Holdings & Another vs Ndungu & 2 Others KLR (E & L) 1298** in which the court, whilst quoting Jowitts Dictionary of English Law 2nd (Edition) stated:-

“It is all indispensable requirement of justice that the party who had to decide shall hear both sides giving each an opportunity of hearing what was argued against him.”

The Respondent being an administrative body is bound to observe the rules of natural justice despite lack of express provision for the principle in the **Forests Act, 2005**. In **Cooper vs Wandsworth Board of Works (1963) 14 C.B.**, Byles J stated thus:-

“Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law shall supply the omission of the legislature.”

HALSBURY’S LAWS OF ENGLAND, 4th Edition Vol. 1 at page 111 from paragraph 89 says this about the order of mandamus:-

“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.”

In **Kenya National Examination Council Vs Republic, Ex-Parte Geoffrey Njoroge & Others, Civil Appeal No. 266 of 1996**, the Court of Appeal stated that the order can only issue when the person concerned has refused to perform the public duty imposed upon him. This how it put it:-

“...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.”

I concur with Lenaola J’s view in **Wamwere Vs Attorney General, [92004] 1 KLR 166** that a public officer cannot:-

“...be compelled to do something when 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 have perused the annexures to the affidavit in support of this application but I have not been able to find the Applicants application to the Respondent which it has refused to consider. In the circumstances, I agree with counsel for the Respondent that mandamus cannot issue and I accordingly dismiss the prayer for that order.

On the order of prohibition, however, I think the Applicants are on firm ground. Annexed to the affidavit in support of the application are letters from the Applicants complaining of harassment by the Respondent’s officers. The Respondent has not disputed those claims, having only filed grounds of opposition and no replying affidavit. In the circumstances, I find those complaints established and I accordingly grant the order of prohibition as prayed.

The Applicants made two prayers but have succeeded in obtaining only one. In the circumstances I order that each party bears its own costs of this application.

DATED and DELIVERED at Nakuru this 28th day of June, 2010.

**D. K. MARAGA
JUDGE.**