



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

MISC CIVIL APPLI 744 OF 2008

IN THE MATTER OF AN APPLICATION BY MANTRAD ENTERPRISES LIMITED FOR ORDERS OF

MANDAMUS

AND

IN THE MATTER OF THE DIRECTOR, KENYA FOREST SERVICE

AND

IN THE MATTER OF ORDER LIII RULE 3(1) OF THE CIVIL PROCEDURE RULES

14774

REPUBLIC.....APPLICANT

V E R S U S

DIRECTOR, KENYA FOREST SERVICE.....RESPONDENT

EX PARTE.....MANTRAD ENTERPRISES

R U L I N G

Before me is a Notice of Motion dated 17th December, 2008 filed by M/S Waruhiu Kowade & Ng’ang’a advocates for the ex-parte applicant **MANTRAD ENTERPRISES LTD**. The respondent is the **DIRECTOR, KENYA FOREST SERVICE**.

The application was brought under Order LIII Rule 3 (1) of the Civil Procedure Rules and the Law Reform Act (**Cap. 26**). The orders sought are as follows-

1. *An Order of mandamus be issued and directed to the Director of the Kenya Forest Service, the Respondent herein commanding him to release motor vehicle KAS 045N ZC 2450 to the ex-parte applicant.*
2. *The respondent be condemned to pay the costs of this application.*

There was a supporting affidavit sworn by **HARRISON MBUGUA** a director of the applicant on 17th December, 2008, which was filed with the Notice of Motion. There is a similar affidavit sworn by the same deponent on 1st December, 2008 and a verifying affidavit filed with the Chamber Summons for leave. The issue in contest in all affidavits is the continued detention of the motor vehicle of the applicant, which was impounded by the officers of **KENYA FOREST SERVICE** on 15th October, 2008 carrying illegal timber cargo, and, according to the applicant, has continued to be detained by them for no apparent legal reason in terms of the Forest Act No. 7 of 2005.

The applicant’s counsel also filed written submissions on 20th March 2009. After giving a summary of the background of the case, it was contended that the respondent as a statutory public body established under an Act of Parliament, was subject to the supervisory jurisdiction of the High court. Reliance was placed on **KENYA NATIONAL EXAMINATIONS COUNCIL –VS- REPUBLIC** Ex parte Geoffrey Njoroge – Civil Appeal No. 266 of 1996 wherein the Court of Appeal stated-

“.....as a creature of statute, the council can only do that which its creator (the Act) and the rules made thereunder permit it to do. If it were to purport to do anything outside that which the Act and the rules permit it to do, then like all public bodies

created by Parliament, it would become amenable to the supervisory jurisdiction of the High Court....”

Reliance was also placed on the case of **MIRUGI KARIUKI –VS- ATTORNEY GENERAL** – Civil Appeal No. 70 of 1991 wherein the Court of Appeal stated-

“..... It is not the absoluteness of the discretion nor the authority exercising it that matter but whether in its exercise, some person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and subject to judicial review.”

It was also contended that the respondent acted without or in excess of its jurisdiction under the Forest Act 2005 section 50(1) (d). It was contended that though the respondent had power to search any vehicle or vessel and seize any forest produce in respect thereof where there is reason that an offence has been committed together with any tools, equipment, vessels, vehicles or livestock used in the commission of the offence, the respondent did not have powers to continue impounding the motor vehicle as the Act clearly required the respondent to forthwith report the seizure to the magistrate having jurisdiction in the area. In the present case, no charges had been preferred against the applicant, who had in fact disclosed to the respondent that the vehicle was on hire by M/S Covinda Enterprises Limited. Reliance was placed on the case of – **ORELLY –VS- MACKMAN (1982) ALL ER 1124** – wherein Lord Diplock stated-

“The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the Legal Validity of a decision making power for any longer period than is absolute necessary in fairness to the person effected by the decision.”

It was also contended that impounding and continued detention of the applicant’s motor vehicle was contrary to the provisions of section 70(c) of the Constitution which provides that a person has a right to own property and not have the same deprived from him except for reasons provided in the law. Reliance was placed on the case of **DANIEL NYONGESA & 4 OTHERS –VS- EGERTON UNIVERSITY** Civil Appeal No. 90 of 1989 wherein the Court of Appeal held-

“It is the duty of court to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the stations and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character.....”_

Lastly, the applicants contended in the written submissions that rules of natural justice were breached, as they were not given a hearing. The cases of **MIRUGI KARIUKI (supra)** was cited. The English case of **ATTORNEY-GENERAL -VS- RYAN** (1980) AC was also cited. In addition reliance was placed on the case of **DANIEL NYONGESA** (supra) where the Court of Appeal stated-

“Courts will interfere and quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”

On this score it was emphasized by the same court that an order of mandamus will issue where a body or person has failed to perform the duty to the detriment of a party who has a right to expect the duty to be performed.

At the hearing Mr. Oburu for the ex-parte applicants made submissions in support of the applicant’s case. Counsel emphasized that the applicant’s motor vehicle was seized by the respondent under section 50(1) (d) of the Forest Act 2005 because it was carrying prohibited goods. It was found that the lorry was carrying sandal wood. The respondents were to release the motor vehicle, but have continued to detain it on the pretext that they want to use it as an exhibit. Counsel contended that the hirers of the motor vehicle had been charged at Kibera Court, but the agents of the applicant have not been charged. Therefore the respondents have no lawful reason to continue the seizure of the motor vehicle, because continued detention of the motor vehicle is a violation of the applicants Constitutional rights. It was also submitted for the applicants that they complied with all rules of procedure with regard to the application, and there was disclosure of all material facts known to the applicants at the time of filing the application. They also submitted that suing the Director of the Kenya Forest Service was correct.

In response to the application, the respondents filed a replying affidavit sworn on 13th March, 2009 by Praxedes C. Tororey the Corporate Secretary. Several objections were raised. It is deposed in the said replying affidavit, inter alia, that the verifying affidavit filed with the Chamber Summons annexed to the statement does not state the facts as required by law, and that the applicant has attached an affidavit to the substantive Notice of Motion in breach of rules of procedure. It is also deposed that the applicant did not disclose material facts. It is further deposed that when the motor-vehicle was impounded at Mai Mahiu the documents on the cargo in possession of the driver and co-driver described the goods in a contradictory manner, thus not disclosing the true nature of the cargo which was later found to be local (**East Africa**) sandalwood which is a protected product under gazette notice number 3176 (**published in the Kenya Gazette of 13th April, 2007**). It is also deposed that the driver and co-driver were charged at Makadara in Criminal Case No. 1716 of 2008 and Makadara Criminal Case No. 99 of 2009. It is further deposed that the said motor vehicle cannot be released to the applicants because it is the subject matter of the two pending criminal cases.

The respondent’s counsel also filed written submissions. In the said written submissions, it is contended inter alia, that the forest officers in detaining the motor vehicle acted in accordance with the provisions of section (50) (1) (d) of the Forest Act, which states-

“A forest officer may search any vehicle or vessel and seize and detain any forest produce in respect of which there is reason to believe that an offence has been committed, together with any tools, equipments, 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. Subsection (3) provides that in enforcing this section, any officer of the service who is of or above the rank of Sergeant Forest Guard shall have the same powers conferred to relevant officers under section 22 and 23 of the Criminal Procedure Code and section 20 of the Police Act.”

It was contended that section 34(2) of the Act creates the offences under which the said motor vehicle and driver and co-driver were detained. Reliance was also placed on applicable provisions (***according to the respondents***) of the East African Community Customs Management Act, 2004, (EACCMA), which in its interpretation section provides-

“Prohibited goods is defined as “any goods, the importation, or carriage coastwise, of which is prohibited under this Act or any law for the time being in force in the partner states;

Smuggling means the importation, exportation or carriage coastwise, or the transfer or removal into or out of a Partner state, of goods with intent to defraud the customs revenue, or to evade any prohibition of, restriction on, regulation or condition as to, such importation, exportation, carriage coastwise, transfer or removal, of any goods prohibited and restricted goods are all goods the importation of which is for the time being prohibited under this Act, or by any written law for the time being in force in Partner State.”

It was contended that Prohibited goods include among others, endangered species of flora and fauna.

It was also emphasized that under section 199 of the EACCMA, apart from the person in charge of a vessel or vehicle (***subject of such offence***) committing an offence subsection (b) (iii) provides for forfeiture as follows-

199 (b)(iii) In the case of the person in charge of vehicle, to a fine not exceeding five thousand dollars and the vehicle and goods in respect of which such offence has been committed shall be liable to forfeiture.”

Contentions were also made on the inapplicability of the order of mandamus in our present case. Several cases were relied on, such as the case of **KENYA NATIONAL EXAMINATION COUNCIL –VS- REPUBLIC – EX Parte Geoffrey Githinji Civil Appeal No. 266 of 1996; REPUBLIC –VS- THE VICE CHANCELLOR JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY (2008) eKLR; MUYA –VS- REPUBLIC (2004) IKLR 515; and REPUBLIC –VS- COMMISSIONER OF POLICE & ANOTHER – EX Parte John Bundi Ngala (2005) eKLR** contentions were also made on deposited of deposits. Reliance was placed on the case of **R-Vs- MOMBASA DEVELOPMENT LIMITED & FOUR OTHERS –** Criminal Revision No. 112 of 1998 and Procedures. In

Criminal Law in Kenya by Momanyi Bwononga. The contention was that mandamus cannot issue in this case. There was also a contention that the Attorney-General should have been sued.

The respondents also, in their written submissions, contended that procedure under Order LIII of the Civil Procedure Rules were not followed. Firstly, that the verifying affidavit filed with the Chamber Summons for leave did not disclose the facts relied upon. Secondly that the applicants filed a separate affidavit with the Notice of Motion. Reliance was placed on the case of **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY –VS- SILVANO OWAKI –** Civil Appeal No. 45 of 2000, which is a Court of Appeal decision, and the case of **PAGREX INTERNATIONAL –VS- MINISTER FOR FINANCE & ANOTHER –** High Court Misc. Civil Case No. 875 of 2001, a decision of Nyamu J., as he then was. Also raised was a requirement that an affidavit giving the names and addresses of persons served and any reasons for failure to serve has to be filed before hearing of the Notice of Motion as required under Order LIII Rule 3 (3) of the Civil Procedure Rules.

Both counsel filed lists of authorities and copies of the court decisions Ms. Oburu who appeared for the respondents also made submissions before me in opposition to the application.

I will deal with the preliminary issues first. The first issue is with regard to the argument that the Director should not have been made a party but the Kenya Forest Service. I see no distinction between the two when the proceedings are relating to actions or inactions in the performance of public functions. In my view, there was nothing wrong with suing the Chief Executive, provided the public organization is also mentioned as was done in this case. See for examples – **COMMISSIONER GENERAL KENYA REVENUE AUTHORITY –VS- OWAKI** (supra). Besides, judicial review proceedings relate to public officials or public institutions or both. Any, or a combination may be sued depending on the facts and circumstances.

On the issue of failure to join the Attorney-General as the Public Prosecutor, I see no error on the part of the applicants. Again, judicial review relates to actions by public officials and public institutions, not necessarily the overall in charge of a particular public function, unless there is a specific complaint against that official. There does not appear to be any complaint raised against the Attorney-General. Failure also to join a relevant party in judicial review proceedings is not fatal, provided no orders are made against a person who is not made a party, or served.

On the issue of the verifying affidavit not containing facts, I agree it does not. However, I will distinguish this case from the cases cited in that there was a supporting affidavit filed with the Chamber Summons that gives the facts of the case. The wording of Order 53 does not limit the number of affidavits to be filed with the Chamber Summons. It only says that those are the only affidavits that can be used in the Notice of Motion, unless the court authorises otherwise through the notice procedure provided under the rules. The affidavit filed by the applicant with the Notice of Motion without following the rules is superfluous, I will not rely on it, and I strike it out. I will however rely on all affidavits filed with the Chamber Summons.

Having dealt with the preliminary issues, this application will however fail. There does not appear to be any dispute that the said lorry was carrying prohibited goods under the Forest Act. There is no dispute that the Forest Officers had a right to detain the lorry. What the

applicant has complained about is the continued detention of the lorry. In my view, if the lorry was detained without the matter being taken to court, which is not the position in this case, the issue of lawfulness, unreasonableness, lack of good faith, ultra vires, arbitrariness and so forth of the respondent would be properly before this court to be considered under judicial review procedure.

However, in our present, case there is no dispute that the matter is in the subordinate court in pending criminal proceedings. The lorry could as well be an intended exhibit. In my view, that court is the proper forum that the issue of release of exhibits and intended exhibits can be addressed, under the Criminal Procedure Code (**Cap. 75**), possibly the Police Act, and any other relevant law. The filing of the criminal cases actually made these proceedings as overtaken by events. The applicant, if he has a genuine interest in the release of the lorry should pursue the matter in the criminal case in the subordinate court urgently. It is only when he is dissatisfied with the decision thereat, that he may come to the High Court in accordance with the provisions of the law.

I find and hold that in the circumstances of this case the orders of mandamus requested cannot issue, and I decline to issue the same.

The upshot is that I dismiss the Notice of Motion herein. As the judicial review proceedings herein appear to have been filed before criminal cases were instituted, I order that parties bear their respective costs of the proceedings.

It is so ordered.

Dated and delivered at Nairobi this 17th day of September, 2009.

GEORGE DULU

JUDGE.