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

Misc Appli 1581 of 2005

MUSA KINGORI GAITA…….....…….PLAINTIFF

Versus

KENYA WILDLIFE SERVICE……...……RESPONDENT

JUDGMENT

On 3rd November 2005, Hon. Justice Emukule granted leave to the applicant to file an application of Judicial Review. The substantive Notice of Motion dated 11th November 2005 was filed on the same date.

The applicant seeks the following orders.

1. That the decision and or order of the respondent made through its Director banning the applicant from entering and/or accessing all National Parks and Reserves managed by the respondent with effect from 24th August 2005 purportedly under the Wildlife (Conservation and Management of National Parks) Regulations Cap 376, (LOK) be and is here by quashed

2. Costs of the application be provided for

The application was supported by a statutory statement filed along with the Chamber Summons on 3rd November 2005 and a verifying affidavit dated 1st November 2005 sworn by Musa Kingori Gaita. The application was opposed and Elema Wario Saru, the respondent's Deputy Head of Investigations swore an affidavit in reply. It is dated 8th December 2005 and filed in court on 13th December 2005.

On 21st February 2006 the respondent also filed a notice of Preliminary Objection based on two grounds; that the applicant had not complied with Order 53 Rule 1(3) and Rule 7 Civil Procedure Rules. The court ordered that the Preliminary Objection be argued in the main application.

Before the hearing of the Notice of Motion commenced, counsel agreed that the issues in this case are similar to those in **MISC APPLICATION 1582/05** and that the arguments would be the same and therefore the ruling in this matter will be binding to Misc 1582/05.

Mr. Mugo argued the application on behalf of the applicant while Mr. Lutta appeared for the respondent.

Brief facts of the applicants case as I understand them are that the applicant is a tour guide by profession and carries on business as a freelance guide cum driver. On 24th August 2005, the respondent

purported to slap a ban on the applicant barring him from entering all its parks and reserves by placing notices at all entry points. The applicant was not personally informed of the ban or served with any written notice.

The applicant was arrested on 17th August 2005 and arraigned before court on 18th August 2005 where he was charged with stealing USD 15,000 (Kshs.1,155,000/=) from the respondent's is smart card offices in Nairobi on 31st March 2005. He suspects that to be the cause of the ban. The applicant claims to have been at work on 31st March 2005, the alleged date of the theft. Upon enquiring his advocate was informed that the ban was effected on the basis of Rule 3 (2) of the Wildlife (conservation and Management (National Parks) Regulations Cap 376. The applicant has been advised that the said rule will only apply if his personal presence in the parks is detrimental to the proper management and control of the Parks and his presence does not threaten the above. In his view, the action taken by the respondent is high handed, oppressive and is causing him suffering and hardship because he ekes out his livelihood as a tour guide cum driver. He also contends that the ban was effected in breach of the rules of natural justice in that he was not given a hearing, his constitutional right of presumption of innocence is breached and the respondent will not be prejudiced in any way by an order of certiorari being issued.

Elema Wario Saru does concede that indeed the applicant had been operating as a tour guide in the parks. He deponed that to enter the park, the tour parties and the driver which included the applicant had to pay a certain fee. The park fees are the main source of revenue for funding the operations and maintenance of the respondents activities.

The respondent had introduced a 'Smart Card'; an electronic card, loaded with credit which a tour driver on park entry uses to pay entry fees. It is computerized and it is like prepaid debit card and the holder can only use it when credit is loaded in it. The credit is purchased from designated points of sale including Nairobi, Voi, Mombasa, Abaderes, Lake Nakuru and other points of access. The holder is issued with a receipt after payment. The cards can be loaded in US Dollars or Kenya shillings. The management had raised concerns over the statistics of visitors not tallying with collections of revenue and Mr. Tom Boit carried out an audit. Mr. Boit informed him of illegal transactions which included smart cards including the applicant's smart card. The illegal loading had been done by collusion of the drivers and some of the respondents employees. The deponent and other officers from the respondent started to track down the suspected drivers and they found that the applicant used his card at Tsavo East National Park on 23rd July 2005 while driving M/vehicle KAL 038 V with illegally acquired credit and was unable to produce receipts for it. The matter was reported to police who arrested and charged the applicant in Criminal 1843/05. Mr Saru contents that the Director has the right to deny the applicant entry into the parks and that the applicant's actions were detrimental to proper management of the parks.

Before I go on to consider the merits of the application, I have to deal with the objections raised in terms of the Preliminary Objections raised by the respondents. Mr. Lutta abandoned the first ground of the Preliminary Objection relating to Order 53 Rule 1 (3) Civil Procedure Rules for reasons that the applicant had shown to him the notice to the Registrar which had been duly stamped by the Registrar and Order 53 Rule 1(3) Civil Procedure Rule had been complied with.

The 2nd limb of the objection relates to Order 53 Rule 7 (1) Civil Procedure Rules. Mr. Lutta argued that the applicant had not complied with the above provision as they had not lodged the decision to be quashed with the Registrar and the court. He urged that there is nothing for the court to quash. It was upto the applicant to annex the decision to the Chamber Summons and in default, he should have given a reasonable explanation to the court as to why he could not lodge it. Rule 7 (1) provides as follows:

"In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, convictions, inquisition or record, unless before the hearing of the Notice, he has lodged a copy thereof verified by an affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court"

The above provision is couched in mandatory terms. The applicant has to lodge with the court the decision which is sought to be quashed. The court has to have a chance to see it. After all, there, may be no decision as the contents may be different from what is alleged. If for some reason the applicant cannot lodge the decision, he has to give a satisfactorily account or explanation to the court as to why not. The rule allows the applicant to lodge the decision any time before the hearing of the motion. No decision was lodged by the applicant nor has any explanation been given as to why it could not be lodged. Mr. Mugo seemed to dismiss the objection by saying that the ban is not denied. That is not a satisfactory explanation and in any case it should have been given before the hearing of the Motion. In the Court of Appeal decision of **SAMSON KIREREA M'RUCHU V MINISTER FOR LANDS AND SETTLEMENT & OTHERS CA 21/1999** the court held that failure to annex the decision or give an explanation renders the Notice of Motion a nullity. It had this to say

"compliance with the above provision is a precondition to seeking an order of certiorari. An applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of his Motion under Order 53 Rule 3 of the Civil Procedure Rules. It would appear to us that the failure to comply with Rule 7 (1) above, does not render the application incompetent ab initio but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the Motion for an order of certiorari".

My understanding of Rule 7 (1) and the Court of Appeal's ruling is that the applicant could have lodged the decision sought to be quashed any time before the hearing of the Motion failing which he should have given the court a satisfactory explanation as to why he could not lodge the said decision. Failure to lodge the decision of the respondent banning the applicants from entering the parks renders the Notice of Motion a nullity and is therefore struck out.

The above notwithstanding I will go ahead to consider whether there was any merit in the applicant's Notice of Motion. The applicant seeks the order of certiorari to quash the decision of the respondent banning him from entering the parks, for reasons that rules of natural justice have been breached; That the decision is irrational; made in bad faith; breached fundamental rights, was high handed and oppressive.

What is the scope of Judicial Review. The Supreme Court Practice 1997 Vol 53/1-14/6 states as follows;

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself.

It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide matters in question"

From the above quotation it is clear that this court must not concern itself with the merits of the decision of the respondent because it is not sitting on appeal nor will it interfere with the respondent's power or discretion. It is common ground that the applicant was a tour guide/driver and visited the parks and reserves taking visitors who come to see our beautiful parks and game reserves and their rich variety of wildlife. It is also not in dispute that he has been banned from entering into the parks as from 24th August 2005 by the Director of the respondent pursuant to Regulation 3(2) of the wildlife (Conservation and Management National Parks) Regulations.

The said Regulations provides as follows;-

"The Director or any officer of the service or an agent of the Director duly authorized in that behalf may refuse permission to any person to enter or be within a National Park, if in his opinion the presence of such person in the National Park would be detrimental to the proper management and control of the National Park and any such person may, if found within the National Park, be ordered to leave the

National Park".

Regulation 3 (3) goes on to define who a permitted occupant is

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"means one of the persons entitled under the terms of special car pass to enter a National Park in the car in respect of which any such pass is issued and is in force."

The pass in the above provision refers to the smart card

The applicant was with others, charged with the offence of stealing contrary to Section 275 of the Penal Code. They are alleged to have stolen USD 15,000 by interfering with the smart card which he was issued with and which is used to pay park entry fees. According to the respondent, investigations had commenced prior to the police arresting the applicant on 17th August 2005 and charging him. It is after the charges were preferred that the ban was slapped on the applicant. The applicant says he should have been heard before the said ban was imposed. The question is whether one has to be heard in every case before such an administrative decision is taken. Of course it is one of the rules of natural justice that one should not be condemned unheard – the audi alteram partem rule.

The regulations under which the applicant was banned do not provide that one should be heard before a decision is taken although I believe that whether or not one was entitled to a hearing in any particular case depends on the circumstances of each case. In the case of CHARLES KANYINGI KARINA V TRANSPORT LICENSING BOARD MISC APP 1214/04, Justice Nyamu held that it was not necessary that one be given a hearing in each and every case and refused to quash the decision of TLB suspending ones PSV licence for three months.

The respondent's case is that they had been carrying out investigations on the smart card following shortfalls in what the parks collected in revenue in relation to the visitors they received at the parks. I believe that during the investigations the applicant must have been interrogated as his smart card was one of those questioned over the fraud. The investigations culminated in the applicant being arrested and charged. In my considered view, theft or fraud relating to park charges touch on the very existence of the parks.

The parks have to raise sufficient funds to keep the parks in good condition, to ensure roads are accessible, there is adequate security and ensure that they are kept to standards required for purposes of the Tourism Industry which is one of the key earner of foreign currency for Kenya. Theft or fraud would be detrimental to the proper management and even control of the parks and in my view the director had good reason to invoke his powers under Regulation 3 (2) of the Rules.

As considered above, there had been investigations, the applicant was aware of them. If the respondent had given the applicant a hearing before the ban was slapped on him, that may have prejudiced the criminal case pending before court and may have breached the subjudice rule. This is because, the hearing would have been in respect of the allegations of theft or fraud in which the applicant was a suspect. I find that a hearing was unnecessary in the circumstances and in my view the applicant should only have been notified of the ban. The applicant alleges that he learnt of the ban from the entry points to the parks. If indeed notices of the ban were only fixed at entry points to the parks, this may have embarrassed the tourism industry and caused unnecessary inconvience to tourists who may have been with the applicant at the time of learning of the ban.

The respondent did not deny that, that is the method they used to notify the applicant. The applicant claims that he has been presumed guilty before the hearing of his case but that is not the case. If the applicant had been employed by the Government or a company and there were allegations of theft or fraud, he would be subjected to suspension or interdiction pending investigations or the hearing of the criminal charges. I believe that if the case is heard and the applicant is found to be innocent, he can request the respondent to lift the ban failing which he can move to court for declaratory orders or

injunctions. In fact that seems to be the applicants way out as he seems to be seeking declaratory orders of breach of his fundamental rights in an application for Judicial Review. I come to the conclusion that a hearing was not necessary under the circumstances and the rules of natural justice were not breached.

The applicant will be heard at the trial of the criminal case which will determine whether or not the ban against him will be lifted. On this point, the applicant had relied on the case of MATIBA V AG (1995-98) IEALR 192 where the court held that no man should be condemned unheard and that Matiba had not been heard by the Hon. Court. However, the facts of the case before us and that of MATIBA are very different.

Did the respondent need to give reasons for the ban? The right to a hearing usually implies that the hearing will be conducted fairly and reasons will be given for the decision that will be arrived at. I have found earlier in this ruling that in the circumstances of this case, a hearing was not necessary and may have prejudiced the criminal case that is pending before court because the ban came after applicant was charged. The decision banning the applicant from the park was not annexed and so the court has no idea how it was communicated and whether reasons were given but that notwith- standing, I find the giving of reasons would have only come up at the hearing which the court found to have been unnecessary in the circumstances.

Did the respondent act irrationally, oppressively or maliciously as alleged? Though the applicant made these allegations there was no evidence to prove any of the above.

In the CHARLES KANYINGI case, the judge considered what it means for a decision to be irrational. He quoted J. Diplock in the case of R V HIGHER EDUCATION FUNDING COUNCIL ex parte institute of surgery CA 1994 where he defined irrationality as;

"It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at "

The decision to ban the applicant from the parks cannot be said to be so outrageous as to defy logic. The applicant is a suspect in a case involving theft from the park.

So, would this court have granted the order of certiorari?

In Halsburys Laws of Island 4th Ed Vol 11 page 805 para 1508, certiorari is defined as follows:

"Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles"

Though I have found above that the respondent should have notified the applicant of the ban, yet under the circumstances obtaining, even if notice was not given, the court would not grant an order of certiorari because of the wide public interest involved. The funds collected at the parks are public funds. They enhance the sustainance and development of the Tourist Industry in Kenya which is one of the highest foreign exchange earners. If the court were to quash the decision banning the applicant from entry into the parks and more fraud or theft was committed, it could be the wider public to suffer loss. The public interest far outweighs the private interest of the applicant and this court would not have granted the order of certiorari anyway.

The Notice of Motion dated 11th November 2005 is struck out in any event for being a nullity. Costs to the respondents. These orders also apply to Misc. Application 1582 of 2005.

Dated and delivered this 16th day of May, 2006.

R.P.V. WENDOH

JUDGE

Read in the presence of Mr. Mugo for the Applicant and Mr. Lutta for Respondents.

R.P.V. WENDOH

JUDGE