



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

Misc Civ Appli 491 of 2004

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
PROHIBITION AND CERTIORARI**

REPUBLIC

EX-PARTE

JAMES KAHUHA THUO)

**MARGARET MUTHONI NGUGI).....
APPLICANTS**

AND

THE PRINCIPAL MAGISTRATE'S COURT AT GITHUNGURI)

**THE COMMISSIONER OF POLICE).....
RESPONDENTS**

JUDGMENT

In this matter the two applicants who are tea growers in Githunguri Kiambu District were charged in a Githunguri Court in 383 of 2004 *R v James Kahuha Thuo* and 460 of 2004 *R v Margaret Muthoni Ngugi* with offences of transporting green tea contrary to s 13A 1 (b) Chapter 343 of Laws of Kenya as read with s 16 (b) of the Tea Amendment Act 1999.

The application dated 14th May 2004 seeks orders of prohibition against the Attorney General and the Kenya police by prohibiting the preferring any charges against or prosecuting the applicants in the two cases.

It also seeks an order of prohibition against the Principal Magistrate or any other magistrate at Githunguri from hearing, continuing with the hearing or determining the case or any charge against the applicants in the two cases.

The third order sought is an order of certiorari to remove and quash any judgment, order conviction or other proceedings in Githunguri Principal Magistrate's Court in the Criminal cases described above.

And finally a declaration that no licenses or permits are required to grow or transport tea by virtue of section 8 of the Tea Act Cap 343 of the laws of Kenya as amended by the Tea (Amendment) Act 1999.

Both applicants claim to be registered growers with KARIRANA TEA FACTORY and they claim that the charges preferred against them arose from a complaint made by a rival factory called Kambaa Tea Factory and that the police are being used to harass them so that they can instead register with Kambaa Tea Factory.

They claim that there is an error of law in that after the amendment of the Tea Act Cap 343 by The Tea (Amendment) Act 1999 No 6 of 1999 no permits or licenses are required to be issued by the Tea Board or any other regulatory authority for planting or transportation of tea.

The two applicants were also charged without taking any statements or giving them a hearing whatsoever and that the criminal charges were motivated by malice and were preferred for a purpose other than the spirit of the administration of justice, criminal law and the Constitution and they constitute an infringement of applicants right to liberty and equal protection of law. They also claim that the police used their power arbitrarily and without justification.

The respondents claim inter alia, through an affidavit of Stephen Ringera an Inspector of police:

1. That the applicants have been charged with known offences and that the applicants were transporting tea leaves to factories other than their designated factory by using unauthorized vehicles.
2. They claim that a permit was required in each case and they only arrested the two applicants after failing to produce a permit.

Counsel for each party have also made brief submissions emphasizing on the above points.

It is common ground that the Tea Act cap 343 was amended in 1999 by the Tea (Amendment) Act No 6 of 1999.

The first applicant has been charged with the offence of transporting tea without a permit contrary to s 13A I (b) as read together with section 16 of the Tea (Amendment) Act 1999.

The second applicant has similarly been charged with an offence contrary to s 13A (i)(b) as read together with The Tea (Amendment) Act s 16.

S 16 of the Tea (Amendment) Act 1999 deleted completely sub paragraph b (ii) of S 13A which previously read:

a) buys, sells, exposes for sale, transports or has in his possession any tea which to his knowledge or belief

(ii) “is being or has been moved otherwise than in accordance with regulations controlling such movement”

On the other hand the regulations which controlled such movement are the Tea (Movement Control) Regulations appearing at page 27 of the Tea Act Cap 343. The regulations required a written permit – see Regulation 3.

I find that following the deletion of s 13 A b(ii) by the Tea (Amendment) Act 1999 the regulations referred to in b(ii) must have been impliedly repealed because regulations have to have as their base a provision in the parent Act and cannot exist on their own.

The Tea (Amendment) Act No 6 of 1999 repealed and replaced s 8 of the Tea Act Cap 343 by the enactment of a new section 8 which reads:-

8(1)

“Every tea grower shall upon the commencement of this section, register with the tea factory to which he delivers green leaf, by supplying such particulars as the Board, may in regulations prescribe.”

Since it is not in dispute that the applicants are registered with KARIRANA TEA FACTORY the complaint by KAMBAA TEA FACTORY does not have any basis in law unless it was designated as the factory to which the applicants must deliver the green leaf. No such designation has been shown to the court or any supporting regulations on transportation or on designated vehicles.

Similarly the provision under s 13A b(ii) regulating movement having been repealed I find that the requirement of a permit as per the above regulations were also repealed and their breach cannot constitute an offence not defined by the parent Act. The applicants were charged on 1st March 2004 and 29th March 2004 respectively and the Amending Act came in force on 14th January 2000.

It is therefore irresistible for the court to find that the two applicants have been charged with offences not defined anywhere or with offences not known to law. The court finds that the very act of charging them with non-existent offences is an unlawful act. It is a cardinal principle of the rule of law that a person can only be charged with breaches of law in ordinary courts and with nothing else. Any attempt to charge a person otherwise is an infringement of the rule of law and the Constitution specifically prohibits any conviction except in respect of contempt under s 77 (8) and the proviso.

For the above reasons an order of certiorari shall issue in terms of the prayer 3 and the record, order or proceedings are hereby immediately removed to this court and forthwith quashed and orders of prohibition shall also issue in terms of prayer 1 and 2 of the application dated 14th May 2004.

As regards the prayer of declaration in terms of prayer 4 the same is declined because this court has currently no power to give declarations in judicial review in the face of s 8 and 9 of the Law Reform Act.

I give no order as to costs.

It is so ordered.

DATED and delivered at Nairobi this 8th day of July 2005.

J G Nyamu

JUDGE