



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. 29 OF 1999

BETWEEN

MOHAMED ABDI & 4 OTHERSAPPLICANTS

VERSUS

MINISTER OFFICE OF THE PRESIDENT & 2 OTHERSRESPONDENTS

RULING

This application, under judicial review provisions (see order LIII of the Civil Procedure Rules) was filed in this Court by Notice of Motion on 27th May 1999.

It sought various orders from this Court; namely;-

An order of prohibition do issue to stop the respondents from seizing and alienating the applicant's 310 herd of cattle seized from them on 6th May 1999. An order of *certiorari* do issue to quash the respondents' decision to seize and deliver to the Samburu community the applicants' 310 herd of cattle;

An order for the 2nd and 3rd respondents to account and give back to the respondents the 310 herd of cattle seized from them on 6th May 1999 and: costs be provided for.

The application was supported by an affidavit deposed to by one Mohamed Abdi; one of the complainants and the statement of facts filed by counsel for the complainants.

The statement alleged that 6 complainants named in paragraph 4 thereof on 6th May 1999 were herding their livestock comprising of 310 herd of cattle when the second respondent, then District Commissioner Isiolo district using regular and administration policemen rounded off and seized all these cattle.

That these cattle were driven to Isiolo Police Station to be handed over to Samburu herdsman through the 3rd respondent, the District Commissioner Samburu district from whom it was alleged that they had been stolen.

That in spite of the complainants claim to the head of cattle, the 2nd respondent refused and thereafter proceeded to hand over the cattle to Samburu herdsman through the 3rd respondent.

That the complainants complaints and claim was never recorded at Isiolo Police Station and that they were deprived of their property contrary to the Constitution and/or without due process of the law.

The statement of facts alleges further that the complainants were denied an opportunity to be heard in order to ascertain whether these particular cattle had been stolen or the claimants were rightful owners thereof.

That 2nd and 3rd respondents acted in an arbitrary manner and misused their positions and state machinery to deprive the complainants of their property contrary to the law; hence the application for *certiorari* and prohibition.

According to the affidavit of Mohammed Abdi, he is a herdsman of Somali origin who tends his livestock within Burat and surrounding areas.

That at times he and others criss-cross Isiolo and Samburu districts in search of green pastures for their livestock.

That on 6th May 1999 he and others were herding their livestock separately in Burat area in Isiolo district when a contingent of armed administration and regular policemen accompanied by Samburu herdsmen came to his/ their grazing grounds and, with the aid of an aircraft, rounded all the cattle which were driven to Isiolo Police Station.

According to Mohammed Abdi's affidavit the seized animals were theirs and that there was nothing to indicate or prove that these animals had been stolen from the Samburu herdsman and that there were no Samburu herdsmen to identify the seized cattle as belonging to them.

That no record was taken and kept regarding the number of cattle seized from each of the complainants in spite of their request that this be done.

That the request by the complainants that they be arrested and charged with stock theft and that the seized cattle be retained as exhibits was ignored and instead some of them were locked up in police cells for complaining about seizure of the cattle.

According to Abdi, the complainants were being deprived of their property without being given an opportunity to be heard and without the due process of the law and so forth.

Replying affidavits were sworn to and filed by the District Commissioners Samburu and Isiolo and grounds of opposition filed by the resident state counsel Meru.

The Isiolo District Commissioner, John Egesa deponed that he was served with the application for judicial review on 2nd June 1999 by which time the disputed livestock had already been handed over to the Samburu community, hence the application had been overtaken by events.

According to his affidavit, the operation to recover the stolen animals from Samburu herdsmen commenced when the same had been tracked to Isiolo district by the Samburu District Security Committee.

That when the cattle were found in the hilly thicket of Leborua on 6.5.99 those herding them took off and disappeared. That the animals numbering 237 were driven to Isiolo Police Station where they were positively identified by claimants from Samburu tribesmen – hence they were handed over to the District Security Committee, Samburu.

According to him, the complainants did not come to Isiolo Police Station to lodge any claim over the seized cattle.

According to Paul Yatich's affidavit a report of cattle theft from Samburu tribesmen by Dagodia's of 26th April 1999 was reported to him whereupon he organized a team of security team to track down the stolen cattle upto Dagodia Manyatta within Mulango area of Isiolo district.

That he requested the District Commissioner Isiolo to assist in recovering the stolen cattle and on 6.5.99 he received a report that some 277 head of cattle had been recovered.

That on 7.5.99 he went to Isiolo with 7 Samburu claimants who positively identified 277 cattle as theirs. That these cattle were handed over to Samburu claimants at Archers Police Station on the same day.

Thus these are conflicting affidavits from the complainants and those of the respondents.

But one thing must be clear, that this was a big operation where many heavily armed security members were involved backed by an aircraft.

In an area where cattle rustling is the order of the day and that during such operation deaths are imminent, nobody, including innocent herdsmen can stand around waiting. They will, as a matter of course, take off for dear lives.

In this case however, the herders did not take off and disappear. Contrary to what the deponents to the replying affidavits say, they followed the seized cattle to Isiolo Police Station to lay claims thereon and because their pleas were not headed, they went and instructed counsel on 7th May 1999 who filed an application for leave to file this application for judicial review. It is dated 7.5.99 and filed under certificate of urgency.

Moreover, cattle rustlers with large herds of stolen cattle are not known to give up that simply and run away. They engage trackers of such cattle and even police in a shoot-out and only surrender or run away when they are overpowered.

Nothing of the sort happened in this case save we are told the herders took off and disappeared.

But during submissions in this application I was informed that when the first complainant Mohamed Abdi tried to protest against seizure of his cattle he was arrested and charged with creating a disturbance in Meru Chief Magistrate's Court Criminal Case Number 1056 of 1999. This submission was not denied or otherwise challenged by the state counsel who appeared to defend the two District Commissioner's involved in this dispute.

In light of these submissions, I am inclined to accept the complainants side of the story that they were ambushed by the provincial administration through regular and administration police officers as well as General Service Unit Personnel while innocently grazing their cattle and were made to part with them in the manner they did not understand.

The cattle were seized. The complainants say they were 310 in total while the respondents say they seized 277 cattle. Whichever number is correct these cattle were handed over to the 3rd respondent by the 2nd respondent who later gave them to the Samburu community under the pretext that these were the animals previously stolen from the Samburu community.

Though the 2nd and 3rd respondents depone in their replying affidavits that when the disputed animals were seized nobody came up to lay a claim on them or that the Samburu community, whose cattle had previously been stolen, came up and positively identified them, the submissions that the complainants protested the seizure and that infact one of them was arrested and charged with creating disturbance as a result of this persistent protest outweighs the respondents claim.

I find in fact that the two communities disputed over ownership of the cattle but that the 2nd and 3rd respondents decided, in their own way, to hand over the cattle to the Samburu community.

In coming to his conclusion I am supported by a newspaper cutting attached to the application for leave headlined:

“Protests as DC hands back ‘stolen’ cattle”

contents whereof gives the insight to what really transpired.

However, these details as to what happened, are not the real issues in the application before this Court. The orders sought are those of *certiorari*, prohibition and for the 2nd and 3rd respondents to account and give back to the complainants the 310 head of cattle seized from them on 6th May 1999.

An order of *certiorari* is issued to quash a decision or order already made if such decision or order is made without or in excess of jurisdiction or where the Rules of Natural Justice are not complied with or such like reasons.

A district commissioner is the head of an administrative district. He chairs various district committee meetings including education, security, agricultural and many others.

The role of maintaining security in the district rests with the police and whoever is found to have committed an offence is arrested and charged in a Court of law.

Apart from chairing security meetings in the district, there is no statutory duty vested in the District Commissioner to go out or send his officers out on attachment missions.

In the dispute before me, the District Commissioner Isiolo, then a Mr Egesa, says he received information from his counter part, the District Commissioner Samburu, then a Mr Yatch about some cattle which had been stolen from Samburu and which had been tracked to within Mulango area in Isiolo district.

Then the said Isiolo District Commissioner says that he received information from a councillor Omar Elmi who knew where the stolen cattle were and that it was this councillor who brought to Isiolo Police Station some 40 cattle which he alleged were amongst those stolen from Samburu by Dagodia clansmen.

Pausing here for a moment, the councillor Omar Elmi said to have made these vital revelations even going as far as to produce 40 of the alleged stolen animals, did not swear an affidavit to support the averments, in the Isiolo District Commissioner's replying affidavit.

And if this councillor was of such vital assistance, why did the District Commissioner's team not accompany him to know where in particular, he, the said councillor, had recovered these 40 head of cattle?

Then the District Commissioner Isiolo goes or sends this team out, on intelligence information, that the remaining animals were being hidden in the rough terrain hilly area of Leborua where the same were being watered and grazed at night.

Of course when the administrator refers to intelligence reports he expects nobody to insist on the source of such reports.

Thus then the District Commissioner's averments are mainly based on hearsay and hence are unsupported giving room for doubts about their authenticity.

His said averments refer to "we" and it is not explained if he himself took part in the operation but according to known practice, district commissioners rarely take part in such difficult operations, and more often than not, they authorize or command, police bosses in their areas of jurisdiction to undertake them.

In this particular case, therefore, it is the Isiolo District Commissioner who authorized the operation which took place on 6th May 1999 leading to the seizure of the cattle now in dispute.

I cannot call this "discovery" because ownership of these animals was disputed between the Samburu tribesmen and the claimants herein but then the Isiolo District Commissioner after receiving the seized cattle from his team of trackers, handed them over to the District Commissioner Samburu who then gave them to the Samburu clansmen whom he alleges positively identified them as the ones previously stolen

from them.

But the two District Commissioners did not form a civil court to decide on who between the Samburu and Dagodia clansmen, owned the seized animals?

Even if they formed themselves into some sort of Court there is no record of their deliberations or proceedings or that they gave each clansmen from either side an opportunity to be heard in order to enable them decide conclusively on the ownership of the disputed animals.

To be mild about this exercise, I can simply say the Court, if at all, was of the Kangaroo type where no proceedings or record was kept but where the two District Commissioner's acted on the spur of the moment and/or motions.

Where somebody is found with animals suspected to have been stolen, he is taken to Court and charged with that offence. Depending on the outcome of the case the question of ownership of the stolen item can then be decided.

In the case of the seized animals, the complainants, including Mohammed Abdi, came up to claim ownership and if they were suspected to have stolen or even handled them, they should have been arrested and taken to Court rather than the animals being seized and arbitrarily handed over to a community just because they had reported theft of their cattle previously.

However the speed with which the application for leave was filed in Court after the seizure of the animals on 6th May 1999 (note, the application was made on 10th May 1999) indicate that the order urgently sought was that of prohibition to prohibit the 2nd and 3rd respondents from seizing and alienating the complainants 310 head of cattle seized from them on 6th May 1999.

But from the documents filed in this Court and the submissions made, it is clear that the two administrators acted hastily and as soon as they purportedly "recovered" the "stolen cattle" they handed them over to the Samburu clansmen on 7th May 1999.

Yet an order of prohibition is one from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.

It lies, not only for excess of jurisdiction or absence of it but also for departure from the Rules of Natural Justice. It does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.

When these principles are applied to the present case, I would consider the District Commissioner's Isiolo and Samburu districts respectively chairing their district security meetings and addressing issues relating to cattle rustling within their areas of jurisdiction and/or what actions to be taken to..... them, to be inferior tribunals or bodies. But whatever decisions they take in such meetings should be within the scope of the laws of the land.

In this case, however, the order of prohibition sought in the application filed in Court on 25th May 1999 came too late in the day when the act intended to be stopped had already taken effect on 6th/7th May 1999.

Prohibition looks to the future and an order thereof must be issued on an anticipated event. It cannot intervene when a decision has already been made; (*Kenya National Examination Council v Republic – Ex-parte – Geoffrey Gathenji Njoroge & others* Civil Appeal No 266 of 1996).

In that case then the other remedy would be one an order of *certiorari*. But here again much as the Court can make the order to quash the decision of the District Commissioner that the 277 or 310 head of cattle be handed over to the Samburu clansmen, what would be the effect; after the cattle were handed over, we

do not know what may have happened to them – the most likely being that since the ownership was disputed and that the area is prone to cattle rustling, they must have been disposed of one way or the other.

Moreover, it is not clear what decision was made or who made it as there is no record of it anywhere. But what is known for sure is that either 277 or 310 head of cattle was seized from the complainants by orders of the 2nd respondent and handed over to the 3rd respondent who then released them to the Samburu community (clansmen) under the guise that these are the animals previously stolen from them.

But if the most deserving order sought by the complainants was that of prohibition which had been overtaken by events and that an order of *certiorari* can only be made to call into this Court a decision, order of proceedings of an inferior tribunal or body for quashing, which decision, order or proceedings do not exist and further that an order of *mandamus* in this case cannot be made as it is not clear if the cattle in dispute exist any longer, then for what value would this Court make any of the orders sought in this application given that a Court does not or ought not to act in vain by making futile or orders which cannot be enforced?

I decline to grant any of the orders sought herein and advise the applicants to seek further legal counsel as to what forum would best suit their complaints. The application therefore, fails.

And in this type of case where the applicants were headed to win the application save for the technical hitches, I would direct that each party bears his/their own costs of the application.

Dated and Delivered at Meru this 10th day of February 2000.

D.K.S.AGANYANYA

JUDGE