



Republic v Kenya Forest Service & 3 others; Warui (Interested Party) (Judicial Review Miscellaneous Application 1 of 2022) [2023] KEHC 1000 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 1 OF 2022
CM KARIUKI, J
FEBRUARY 16, 2023**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARI, PROHIBITION, AND MANDAMUS**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE FOREST CONSERVATION AND
MANAGEMENT ACT NO. 34 OF 2016, LAWS OF KENYA**

AND

**IN THE MATTER OF NYAHURURU, CHIEF MAGISTRATE'S
COURT CRIMINAL CASE NO. E1076 OF 2022**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA FOREST SERVICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

**CHIEF MAGISTRATE COURT, NYAHURURU LAW COURTS 3RD
RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

AND

ISAAHS MUTHAMI WARUI INTERESTED PARTY



RULING

1. By Notice of motion dated September 12, 2022, the Applicant seeks the orders
 - i. An order of certiorari do hereby issue to remove into this Honourable Court for its being quashed the decision of the 1st and 2nd Respondents to charge and prosecute the *ex parte* Applicant in Nyahururu Chief Magistrate's Criminal Case Number E1076 of 2022, Republic v Isaiahs Muthami Warui.
 - ii. An order of prohibition do hereby issue directed against the Respondents herein, prohibiting further proceedings in Nyahururu Chief Magistrate's Case Number E1076 of 2022, Republic v Isaiahs Warui Muthami, and further prohibiting the first and second Respondents from insulting any future charges against the *ex parte* Applicant in respect to the same subject matter.
 - iii. An order of Mandamus do hereby issue directed against the one and 2nd Respondents, compelling them to immediately and forthwith release to the *ex parte* Applicant the 108 cedar posts and all other items confiscated pursuant to the charges in Nyahururu Chief Magistrate's Criminal Case Number E1076 of 2022, Republic v Isaiahs Muthami Warui.
 - iv. The 1st Respondent bear costs of these Judicial Review proceedings.
2. The grounds on the face of the motion support the same:
3. By an order of this Honourable Court made on the August 23, 2022 but issued on the September 1, 2022, the *Ex Parte* Applicant was granted leave to file and serve this Notice of Motion seeking an order of Judicial Review for purposes of quashing the decision of the 1st and 2nd Respondents to charge him in Nyahururu Chief Magistrate's Criminal Case Number E1076 of 2022, Republic v Isaiahs Muthami Warui *inter alia*.
4. On the July 16, 2022, the Applicant was said to have been cutting trees within his portion of land in which he holds a beneficial interest for purposes of using the same for fencing when officers of the 1st Respondent set on him by arresting him and hauling him into the police van and whereof, he was taken to a police station on grounds that he had cut trees in a forest.
5. The *ex parte* Applicant was then forced to pay a Kshs 10,000/- as cash bail to secure his freedom and was directed to appear in court later to take a plea.
6. On the July 25, 2022, the *ex parte* Applicant was arraigned at Nyahururu Chief Magistrate's Court in Criminal Case No E1076 of 2022 and charged with the offence of "cutting forest produce in personal forest (farm land/private farm) without authority contrary to section 64(1) (a) as read with sections 64(2) and 68(1) of the *Forest Conservation And Management Act*".
7. The Applicant aver that, said Sections of the Law do not disclose any offense committed by the *ex parte* Applicant herein in light of the facts of the case. Accordingly, he has not committed any crime under the said Sections of the law and/or any other provision of the Forest Conservation and Management Act and/or any other known laws of the land.
8. The said Parcel of land leasehold property of description Land Title Number LR 102458 being Land Reference Number 7222/1 is not and has never been declared and/or gazetted as a Forest, whether



Public, Private or otherwise, within the context of the *Forest Conservation and Management Act* but rather it is private property as stipulated under Article 64 of the *Constitution, 2010*.

9. It is averred that, Consequently, the charges against the ex-parte Applicant and his prosecution in Nyahururu Chief Magistrate's Criminal Case No E1076 of 2022 is therefore wrongful, arbitrary, malicious, without any lawful basis, and has violated and threatens to violate the ex parte Applicants fundamental rights under Articles 28.
10. The Respondent, via affidavit of PC Charles Murugi of Ndaragwa Police Station, sworn on September 14, 2022, opposes the application. He states that Ndaragwa police Station is Investigating a case of cutting forest provisional forests (private forests) without authority contrary to section 64(1)(a) as read with section 64(2) of the *Forest Conservation And Management Act* No 2016. Ndaragwa Police Station OB 19/06/07/2022 refers.
11. That, on the July 16, 2022 at around 1200hrs, the petitioner authorized the felling down of two substantial red cedar trees in his private forest located within Matuiku village in Nyandarua North Sub County; the applicant gave no regard to laws governing the management of Kenya forests as enshrined in the Kenya *Forest Conservation Management Act* No 34 of 2016.
12. The applicant never produced a permit or a management agreement allowing him to fell trees, thus contravening the Act. The applicant was committing the offense of cutting forest produce in a personal forest (private firm) without authority, contrary to section 64(1)(a) as read with section 64(2) of the *Forest Conservation And Management Act* No 34 of 2016.
13. The applicant applied for judicial review over the matter, citing that the charges did not exist under the law.
14. That, on September 7, 2022, an amended Charge sheet to read and made a subsequent amendment of charge sheet September 7, 2022 to read of cutting forest produce in a provisional forest (private forest) without authority contrary to section 64(1)(a) as read with section 64(2) of the *forest conservation and management Act* No 34 of 2016. It was drafted and read to the applicant on the same day.
15. The parties were directed to submit which was done orally in brief.

Issues, analysis, and determination

16. After going through the affidavits annexures and statements on record, I find the issues are whether the charges as framed disclose an offense that can be tried in the circumstances of the matter herein. If the above is negative, what is the appropriate remedy available, and what are the orders as to costs?
17. The grounds for Judicial Review Previously derived from common law are – ultra vires, illegality, irrationality, unreasonableness Post-2010 – Based on constitutional provisions, common law, and Statute. Section 7(2) A court or tribunal under subsection (1) may review an administrative action or decision, if(a) the person who made the decision (i) was not authorized to do so by the empowering provision; (ii) acted in excess of jurisdiction or power conferred under any written law; (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation; (iv) was biased or may reasonably be suspected of bias; or (v) denied the person to whom the administrative action or decision relates, (a) reasonable opportunity to state the person's case; (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action or decision was procedurally unfair; (d) the action or decision was materially influenced by an error of law; (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; (f) the administrator failed to take into account relevant considerations; (g) the administrator acted on the direction of a person or body not authorised



- or empowered by any written law to give such directions; (h) the administrative action or decision was made in bad faith; (i) the administrative action or decision is not rationally connected to the purpose for which it was taken; (ii) the purpose of the empowering provision; (iii) the information before the administrator; or (iv) the reasons given for it by the administrator; (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law; (k) the administrative action or decision is unreasonable; (l) the administrative action or decision is not proportionate to the interests or rights affected; (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates; (n) the administrative action or decision is unfair; or (o) the administrative action or decision is taken or made in abuse of power.
19. On the July 25, 2022, the *ex parte* Applicant was arraigned at Nyahururu Chief Magistrate's Court in Criminal Case No E1076 of 2022 and charged with the offence of "cutting forest produce in personal forest (farm land/private farm) without authority contrary to section 64(1) (a) as read with sections 64(2) and 68(1) of the [Forest Conservation And Management Act](#)".
 20. To start with, provisions of section 64(1) (a) state that,
 - “Except under a license or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest—
 - (a) fell, cut, take, burn, injure or remove any forest produce; "forest" means land which is declared or registered as a forest or woody vegetation growing nearby in an area of over 0.5 hectares, including a forest in the process of establishment, woodlands, thickets;
 21. Section 2. The interpretation states that; In this Act, unless the context otherwise requires—"provisional forests" means any forest which has been declared a temporary forest by the Cabinet secretary under Section 35, which in turn states, Declaration and reversion of provisional forests;(1) Upon the recommendation of the Service or the relevant county government, the Cabinet Secretary may, by notice in the Gazette, declare any community or private forest, which in the opinion of the Service is mismanaged or neglected, to be a provisional forest.
 22. Thus, the Declaration via a gazette notice is the common thread in the provisions invoked. No evidence of declaration has been furnished to prove that the *locus in quo* of the alleged cut tree was within a declared forest per said provisions cited.
 23. The said Sections of the Law do not disclose any offense committed by the *ex parte* Applicant herein in light of the facts of the case. Accordingly, he has not committed any crime under the said Sections of the law.
 24. The said Parcel of land leasehold property of description Land Title Number LR 102458 being Land Reference Number 7222/1 is not and has never been declared and/or gazetted as a Forest, whether Public, Private or otherwise, within the context of the Forest Conservation and Management Act but rather it is private property as stipulated under Article 64 of the [Constitution, 2010](#).
 25. Consequently, the charges against the *ex-parte* Applicant and his prosecution in Nyahururu Chief Magistrate's Criminal Case No E1076 of 2022 is therefore wrongful, arbitrary, malicious, without any lawful basis, and has violated and threatens to violate the *ex parte* Applicants fundamental rights under Articles 28, 29, 40, 43, 47, and 64 of the [Constitution](#).
 26. The remedies in Judicial Review mandate the court to grant any order that is just and equitable, including an order (a) declaring the rights of the parties in respect of any matter to which the administrative action relates; (b) restraining the administrator from acting or continuing to act in



breach of a duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant; (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator; (d) prohibiting the administrator from acting in a particular manner; (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions; (f) compelling the performance by an administrator of a public duty owed in law.

27. Thus, the court makes the orders;

- i. An order of certiorari do and is hereby issued to remove into this Honourable Court for purposes of its being quashed the decision of the 1st and 2nd Respondents to charge and prosecute the *ex parte* Applicant in Nyahururu Chief Magistrate's Criminal Case Number E1076 of 2022, Republic v Isaiahs Muthami Warui.
- ii. An order of prohibition do and is hereby issued directed against the Respondents herein, prohibiting further proceedings in Nyahururu Chief Magistrate's Case Number E1076 of 2022, Republic v Isaiahs Warui Muthami, and further prohibiting the first and second Respondents from insulting any future charges against the *ex parte* Applicant in respect to the same subject matter.
- iii. An order of *Mandamus* do is and is hereby issued directed against the one and 2nd Respondents, compelling them to immediately and forthwith release to the *ex parte* Applicant the 108 cedar posts and all other items confiscated pursuant to the charges in Nyahururu Chief Magistrate's Criminal Case Number E1076 of 2022, Republic v Isaiahs Muthami Warui.
- iv. No orders as to costs.**

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 16TH DAY OF FEBRUARY 2023.

CHARLES KARIUKI

JUDGE

