REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC JR E004 OF 2021

BETWEEN

REPUBLIC .....APPLICANT

AND

THE PERMANENT SECRETARY MINISTRY OF ENVIRONMENT

& NATURAL RESOURCES.....1ST RESPONDENT

THE DIRECTOR KENYA FOREST SERVICE.....2ND RESPONDENT

EX PARTE: LEMBUS-NARASHA COMMUNITY FOREST ASSOCIATION

HENRY RUTO

SAMUEL KIPSANG

JUDGMENT

1. The ex parte applicants were granted leave on 18th February 2021 to commence these judicial review proceedings. They subsequently filed Notice of Motion dated 2nd March 2021 seeking the following orders:

> 1. [Spent]
>
> 2. [Spent]
>
> 3. THAT the Honourable Court be pleased to issue an order of certiorari removing unto this Honourable court for the purpose of being quashed forthwith the respondents decision, order, decree and proclamation vide letter dated 21st October 2020 and 9th December, 2020 directing the applicants not to cultivate maize in PELIS areas.
>
> 4. THAT the costs of this application and the entire proceedings be provided for.

2. The Notice of Motion is founded on statement of facts and is supported by a verifying affidavit sworn by Henry Ruto, the 2nd ex parte applicant. He deposed that he is the chairman of the 1st ex parte applicant which comprises more than 2000 small scale farmers who reside near Lembus-Narasha Forest. He added that Lembus-Narasha forest is owned by the respondents and measures approximately 61594.4 hectares. That it is public policy to ensure sustainable management and conservation of Kenyan forests and forest resources for the social economic development of the country which includes promotion of community participation in conservation and management of state forests.

3. Mr Ruto deposed further that Plantation Establishment & Livelihood Improvement Scheme (PELIS) was established to facilitate achievement of the dual purpose of re-establishing forest plantation as well as alleviating poverty among the forest community. That the applicants and the respondents formalized an agreement pursuant to which the respondents were to own the forest land and the trees while the applicants were to cultivate. That under the agreement, once trees are harvested from a specific area in the forest, the land would be allocated to the applicants who would further allocate it to some of their members who would then remove tree stamps, clear the area, prepare the land, and plant trees along with their crops.

4. He added that on 21st October 2020 and 9th December 2020, the respondents abruptly issued a notice that there should be no cultivation of maize in the PELIS areas and repeated the declaration through public pronouncements as well as through radio stations. That the announcement will render them jobless and landless and that they are now only allowed to plant short rotation annual low cover crops such as potatoes and beans which cannot sustain them.

5. Mr Ruto went on to state that they were not given any prior notice nor were discussions held with all the relevant stakeholders. That the applicants pay the respondents for the use of the land and that at the end of the last planting season, the respondents indicated to the applicants that they planned to plant over 500 hectares of the forest and the applicants therefore prepared over 800,000 tree seedlings for planting. That the applicants wrote to the respondents seeking clarification and pointing out that planting maize gives them food security.

6. In response, the respondents filed a replying affidavit sworn by Bernard Orinda, who works with the Kenya Forest Service as the Ecosystem Conservator, Baringo County. He deposed that the overall objective of PELIS according to the proposal dated 23rd November 2007 was to establish forest plantations and improve the livelihoods of communities through sustainable collaborative management of gazetted forests and that the implementation was to be done in phases with phase 1 running for four years with a midterm evaluation to determine whether the scheme would be expanded to phase 2. That the proposal provided for monitoring and evaluation to be done by heads of conservancies and the director Kenya Forest Service through visits and half year reports. That if phase 1 ran into problems and the objectives not achievable, phase 2 would be postponed until implementation of phase 1 is streamlined.

7. He also deposed that the 1st ex parte applicant entered into an agreement with Kenya Forest Service on 21st April 2016 one of whose terms was that Kenya Forest Service could terminate or withdraw a particular user right in specific circumstances including the purpose of protecting and conserving biodiversity. He added that the Chief Conservator invited members of the public in the affected areas to seven meetings held between 15th January 2021 and 5th March 2021 and informed them of the decisions. That as an eco-system conservator, he observed that Narasha station had poor survival rates where tree plantations were established alongside maize with two areas having a survival rate of less than 10% and five of them at 0%. That the reasons for the low survival rates include the use of fire to prepare farms resulting in burning of trees, the use of strong herbicides in weeding which affects trees and the lack of removal of maize stalks after harvesting which leads to animals trampling trees while feeding on maize stalks.

8. That the decision to stop cultivation of maize was done in good faith and to ensure sustainable management and conservation of the forest and forest resources for the purpose of protecting biodiversity and in pursuance of 'trees first' policy. That the continuance of planting maize on the PELIS areas would lead to loss of trees. He added that one of the obligations of the first ex parte applicant in the agreement was to assist the Kenya Forest Service in enforcing the provisions of the Forest Act. Finally, he stated that the first ex parte applicant does not have power to sue in its own name since it is registered under the Societies Act.

9. In rebuttal, the ex parte applicants filed a further affidavit sworn by the 2nd ex parte applicant. He denied that the Chief Conservator held public meetings or informed members of the public of the decision as alleged. He further deposed that the claim that there were poor survival rates where tree plantations were established alongside maize was not proved as no scientific reports or photographs were produced.

10. The application was canvassed through written submissions. The ex-parte applicants argued that the respondents unilaterally made the decision complained of without giving them any explanation or involving them in the decision-making process. That the decision is unfair, bereft of public participation and infringed on their rights to information, adequate food and fair administrative action. They relied on the cases of **Bahajj Holding Ltd vs. Abdo Mohammed Bahaj & Co. & Another (Nairobi CA No. 97 of 1998** and **Municipal Council of Mombasa vs. Republic & Umoja Consultant Ltd (CA No. 185 of 2001).** They submitted in conclusion that this court has jurisdiction to hear and determine this matter and that they have locus to institute this application. That the respondents' action was unfair, unprocedural and contrary to the rules of natural justice. They therefore prayed that the judicial review application be allowed with costs.

11. The respondents identified three issues for determination in their submissions: whether the community forest association has powers to institute civil proceedings in its own name, whether there was public participation and whether judicial review is the appropriate forum for raising the applicant's issues. On the 1st issue, it was submitted that the ex parte applicants brought this application as members of the Lembus – Narasha Community Association which is a registered community forest association under the Societies Act and as such it does not have the legal capacity to sue. The respondents relied on the case of **Bridge Hotel Ltd v Wilfred Mutiso Lai Jesus Celebration Centre [2016] eKLR**. Additionally, the respondents cited **Kipsiwo Community Self Help Group v Attorney General and 6 Others [2013] eKLR** and argued that the ex parte applicants failed to provide any express legal authority to represent others in the suit.

12. As regards whether there was public participation, the respondents relied on the case of **Republic v County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR** and submitted that public participation was done as mentioned in the respondents' replying affidavit and as admitted in the ex-parte applicants' statement. That the ex-parte applicants admit to have received information via public announcements and radio stations as was also admitted in their verifying affidavit dated 2nd March 2021. They further submitted that through the public announcements, the ex parte applicants had sufficient time to raise their concerns.

13. On whether judicial review would be the appropriate forum for the applicants to raise their issues, it was submitted that the ex parte applicants raised constitutional issues such as right to information, right to adequate food and right to fair administrative action which cannot be properly addressed by way of judicial review. Arguing that public participation is a constitutional issue, they relied on the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR.** They further argued that the matter raises contested issues of facts which cannot be dealt with by way of judicial review. They urged the court to dismiss the application with costs. Additionally, the respondents also filed further submissions whose contents I have taken note of.

14. I have carefully considered the Notice of Motion, the affidavits and the submissions. The issues that arise for determination are whether the applicants have the capacity to institute the present proceedings and whether the reliefs sought should issue.

15. The ex parte applicants seek an order of certiorari to quash the decisions in the respondents' letters dated 21st October 2020 and 9th

December 2020 directing them not to cultivate maize in PELIS areas. They describe themselves as small scale farmers residing near Lembus-Narasha forest who are members of the Lembus Narasha Community Forest Association (LENCOFA). A perusal of the Certificate of Registration No. 28611 which they have annexed shows that the association was registered under **Section 10** of the **Societies Act**.

16. The respondents contend that the 1st ex parte applicant does not have the capacity to institute civil proceedings in its own name owing to its registration under the **Societies Act**. It is trite law that a society cannot sue in its own name but through its officials in accordance with its constitution. See **Victory Soul Winning Centre (suing through George Njoroge Muraya & 2 others (as its National Officials Trustees) v Simon Muiruri & 8 others [2017] eKLR**. The only possible exception to that requirement is litigation in a constitutional petition under **Article 22** of the **Constitution** wherein it is claimed that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. That exception is made possible by **Article 260** of the **Constitution** which defines "person" to include a company, association or other body of persons whether incorporated or not. See **Kirinyaga United Bar Owners Organization – V- County Secretary Kirinyaga County Government & 6 Others [2014] eKLR**. The matter herein is not a constitutional petition.

17. That said, the 1st ex parte applicant is not the only applicant herein. We also have Henry Ruto and Samuel Kipsang as 2nd and 3rd ex parte applicants respectively. In particular, Henry Ruto deposed in the affidavit in support oof the application for leave to commence these proceedings that he was chairman of the first ex parte applicant as at the date of the application. The third ex parte applicant is said to be one of the small-scale farmers who reside near Lembus-Narasha Forest, a cultivator and part of the forest community. Even on their own, the 2nd and 3rd ex parte applicants could competently originate these proceedings. I therefore find that the applicants had the capacity to institute the present proceedings and that the matter is properly before the court.

18. Should the relief of certiorari which is sought issue? The scope of an order of certiorari was discussed by the Court of Appeal in the case of **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** as follows:

> **… Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons**.

19. The same court later stated in **Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR** thus:

> **…. it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity**.

20. It is also important to restate the mandate of a judicial review court. In that regard, the Court of Appeal stated in **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** as follows:

> **Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits**.

21. The relationship between the parties herein is based on the agreement dated 21st April 2016 between the Kenya Forest Service and the first ex parte applicant. Although none of the parties addressed it, I note that pursuant to clause 3 thereof, the agreement had a lifespan of 5 years from 21st April 2016. The court has not been told if the agreement was extended. Although these proceedings were commenced on 18th February 2021 when the agreement had only 2 months of life left, it later expired on 21st April 2021.

22. Whereas the ex-parte applicants have argued that the respondents unilaterally made the decision complained of without giving them any explanation or involving them in the decision-making process and that the decision is unfair and bereft of public participation, I note that under clause 14 of the agreement, the parties agreed on a dispute resolution mechanism which entailed negotiation, an appeal to the board of the Kenya Forest Service and ultimately a referral to the National Environment Tribunal. I am not persuaded that any valid reason has been given as to why the judicial review jurisdiction of this court should be invoked. If anything, the dispute involves private obligations between the parties arising from the agreement. I see absolutely no room for judicial review in the matter.

23. In view of the foregoing, this court, sitting as a judicial review court, does not have jurisdiction to determine the dispute. A suit filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

24. In the result, Notice of Motion dated 2nd March 2021 is struck out. Owing to the relationship between the parties, I order that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF OCTOBER 2021

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

No appearance for the ex parte applicants

Ms Wanjeri holding brief for Mr Weche for the respondents

Court Assistant: E. Juma