



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**MISC. CIVIL APPLICATION NO. 2 OF 2019**

**JOHN KIPKORE KOMEN.....APPLICANT**

**VERSES**

**THE CHIEF MAGISTRATE KITALE & 3 OTHERS.....RESPONDENTS**

**RULING**

1. By his chamber summons application dated 12<sup>th</sup> February, 2019 the applicant prayed for leave to apply for the orders of certiorari to call into the high court and quash the proceedings and order of the Senior Resident Magistrate made on 21<sup>st</sup> January, 2019 in Kitale CMC Criminal Case No. 241 of 2019 forfeiting timber /Forest produce valued at Ksh.400,000 belonging to the exparte Applicant.
2. He also simultaneously prayed for leave to operate as a stay of the said forfeiture orders.
3. The application was supported by the supporting affidavit of the applicant sworn on the 12<sup>th</sup> February, 2019 together with the statement thereof and the attached annexures.
4. When the same came up for exparte orders this court ordered that the respondents be served and it decline to grant exparte orders.
5. Apparently the applicant did file another application seeking injunctive reliefs which the court decline vide the ruling of Sitati, J dated 7th March, 2019.
6. The Respondents on their part vide the replying affidavit of one Augustine Omamo Owate sworn on 19<sup>th</sup> February, 2019 has opposed the application basically on the grounds that the same has been overtaken by events since the products have been used for public good by the forest department.
7. He also deponed that the applicant cannot be heard to cry foul since he was never a party at the trial or at the lower court for that matter. He urged the court to find that granting the prayers would be an exercise in futility.
8. When the matter came up for hearing the court ordered that it proceeds by way of written submissions which the same has been read as well as the attendant authorities.
9. It must be noted that the regime of judicial review is a specialised area which does not concern itself much on the merits or demerits of the circumstances save to ask the question whether proper procedure was followed.
10. The provisions of Order LIII rule 1(3) of the Civil Procedure Rules does not envisage that in an application for leave granting of stay is automatic but it is dealt with on a case by case basis.
11. In the present case it is clear that the applicant was never a party at the lower court in which he seeks the quashing of its decision. He deponed that he was the owner of the timber that was forfeited to the state by the trial court. He said that he learned of the matter from the drivers of the track which he had contracted to ferry the timber. He attached several documents which included the permits allowing him to ferry the same.
12. In light of the above can it be said that the applicant was not granted the opportunity to be heard hence the rules of natural justice breached by the trial court?
13. I respectfully do not think so for the simple reason that the trial court from the proceedings attached followed all that was expected of it when a party is taking plea. The accused admitted the offence and were each sentence to three months imprisonment unless they paid a fine of ksh. 10,000 each. The court ordered the goods to be forfeited to the state.

14. The Applicant was nowhere. Even if he was there there is no evidence to suggest that he raised any objection to the trial court as the owner of the timber and was denied the chance to express himself. As a matter of fact he came after the fact. There was therefore no evidence that his rights were violated.

15. The issue of whether he had the relevant permits and authority to carry the goods from one county to the other is not within the province of this court to determine for now. All that is necessary is whether the applicant was granted the opportunity to be heard and he was denied. As stated above he was nowhere to be seen. The trial court cannot be faulted.

16. Does the applicant merits the orders he has prayed for? I do not think so for the reasons stated above namely that he was not a party to the proceedings he seeks to quash. What would he call himself once he comes on board? To my mind his chance of reclaiming his items lie elsewhere and not in a judicial review arena.

17. For now the application is hereby disallowed with no orders on costs.

**Signed, dated and delivered at Kitale this 15<sup>th</sup> day of May, 2019.**

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**H.K CHEMITEI**

**JUDGE**

**15/5/19**

**In the presence of:**

**Wanyonyi for the Applicant**

**No appearance for the Respondent**

**Court Assistant – Kirong**

**Ruling read in open court.**