REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

JUDICIAL REVIEW NO. 8 OF 2018.

JOHN CHEGE NJOROGE.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

KENYA FOREST SERVICE.....2NDRESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE CHIEF MAGISTRATE KAJIADO LAW COURT.....4TH RESPONDENT

RULING

The ex-parte applicant filed an application for judicial review under order 53 Rule 3 and 4 of the Civil Procedure Rules, Section 8 and 9 of the Land and Reform Act, Section 3, 4, 5, 7, 10 and 11 of the Fair Administrative Action Act on 27th June, 2018 seeking interalia the following orders:

1. **That an order of Certiorari do issue removing into this court and quash the decision of the Chief Magistrate Kajiado Hon. Shitubi made on 4th April, 2018 in Criminal case No. 491 of 2018 for forfeiting Motor Cycle KMDW 746D.**

2. **THAT an order of Prohibition do issue directed at the Kenya Forest Service prohibiting them from selling Motor Cycle KMDW 746D.**

3. **THAT motor cycle KMDW 746D be released to the ex-parte applicant.**

The application is stated to be supported with an affidavit by the ex-parte applicant dated the same day and the grounds on the face of the notice of motion.

Factual background

On or about 4th April, 2018 one Bernard Mugereki Kigo was arraigned before the Chief Magistrate Court at Kajiado charged with the offence of removing any forest produce contrary to Section 64(1) as read with Section 64\92) of Forest Conservation and Management Act 2016 laws of Kenya. The brief particulars constituting the offence were that on 3rd April, 2018 along Namanga- Nairobi Road Kajiado Central Sub County. The accused Benard Mugereki Kigo was found transporting 3 bags of charcoal using Motor Cycle Registration No. KMDW 764D, make 7ps without a permit from the director of Kenya Forest Service for the year 2018.

During the time of plea, Bernard Mugereki Kigo offered a plea of guilty and was convicted of the offence and sentenced to a fine of Kshs. 10,000 in default three months in prison. In addition the subject Motor Cycle registration KMDW 746D make 7PS and 3 bags of charcoal were forfeited to the state and subsequently remitted to the forest conservators.

The ex-parte applicant Mr. John Chege Njoroge being aggrieved with the decision on forfeiture of the Motor Cycle filed this judicial review application seeking orders of prohibition and certiorari against the respondents. The applicant was granted leave to file and seek judicial review orders.

There is evidence by copy of the affidavit of service upon the respective respondent who opted not to file a rejoinder to the motion. However

at the commencement of the hearing Mr. Meroka, the Principal Prosecution Counsel for the 3rd respondent appeared and in brief submissions conceded to the application. In so far as the other respondents are concerned their position remained undefended.

Mr. Itaya learned counsel for the ex-parte applicant in his submissions entirely relied on the record of the trial court and, of the motion grounds in support and the averments in the affidavit deponed by the ex-parte applicant. Mr. Itaya for the ex-parte applicant contended and submitted that the judicial review application was to challenge the decision making process of the Chief Magistrate which denied the ex-parte applicant due process and an opportunity to be heard on the forfeiture proceedings. The dispute by the ex-parte applicant therefore was, in respect of the decision to forfeit the Motor Cycle Registration KMDW 746D without due process. Mr. Itaya argued that the impugned decision by the Chief Magistrate should therefore be quashed as being in breach of the fair Administrative Action on notice and fair hearing.

Analysis and Determination

In the initial criminal proceedings Bernard Mugereki Kigo was arraigned in court pursuant to Section 64(1) as read with Section 64(2) of the Forest Conservation and Management Act 2016. The provisions of Section 64 deals with prohibited actions within the forest area in Kenya. It is obvious from the language of the statute that the set of prohibited actions include Fell, cut, take, injure or remove any forest produce without a permit or a management agreement issued under the Act by the conservator of forests. It is therefore an offence for any person to do, undertake, any of the prohibited actions without acquiring the necessary permit or license. That is how Bernard Wegereki found himself charged with an offence of removal of forest produce without a permit.

I observe that after sentencing the learned trial Magistrate proceeded to forfeit the subject Motor Cycle under Section 68 of the Act.

Under Section 68 of the Act a person convicted of the offence under Section 64(1) and (2) of the Forest Produce subject matter of the offence shall be forfeited to the state. For purposes of Section 68 the statute permits additional penalties prescribed interalia as follows:

> **"An order that any such person pay the forest owner by way of compensation a sum equal to the detailed value of the forest produce so damaged, injured or removed and where the value amount be estimated ten thousand shillings for each offence. Section 64(2) states that if it is proved to the satisfaction of the court that the person so convicted is the agent or employee or another person, that other person to pay by way of compensation to the forest owner, the value of the forest produce, unless after hearing that other person the court is satisfied that the offence was not done to his negligence or default."**
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> **(c) the vessel, vehicle, tools or implements used in the commission of the offence be forfeited to the service provided that the value of the forest produce shall be either the commercial value of the forest produce or the cost of removing the damages caused to the forest as a result of the offence committed whichever is higher."**

This is the section the learned Chief Magistrate applied to forfeit the Motorcycle subject matter of this judicial review proceedings.

The writ of certiorari deals with errors of law on the fact of the record and acting without jurisdiction.

Before considering the question placed before me it is necessary to revisit the principles which form the foundation of writs of prohibition certiorari and mandamus. In Hallsburys Laws of England 4th Edition Volume 9(1) the learned authors set out the following passage on the prerogative remedies of certiorari, prohibition and mandamus

> **"Historically, prohibition was a word whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts, certiorari was issued to bring the record of an inferior court into the KingsBench for review or to remove indictments for trial in that court. Mandamus was directed to inferior courts and tribunals and to public officers and bodies, to order the performance of a public duty."**

The jurisdiction of these prerogative writs is vested in the High Court. In the context of our constitution under Article 23 3(F) confers upon the High Court original jurisdiction in all matters to grant judicial review relief sought by the applicant on any of the grounds based on the merits of prohibition, certiorari and mandamus. The intention of the framers of the constitution in including Article 23 as a remedy of judicial review was to empower the High Court to exercise jurisdiction and its function of protecting the citizens and other persons against any violation of the constitution or any law made by parliament.

The courts have emphasized in a plethora of cases that judicial review having been entertained as a provision of the constitution is so fundamental to access to justice as a remedy not constricted by geographical or standing factors to ensure the promotion of the rule of Law.

The function of judicial review and the test of materiality and other considerations to grant judicial review the in Kenya is derived from the common law. The House of Lords in the case Council ***of Civil Service Unions v Minister for the Civil Service 1985 AC 374 Lord Di****plock* stated on the scope of judicial review in the following passage: ***"Today one can conveniently classify under the three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call illegality***" The ***second irrationality and the third procedural impropriety"***

> **That is not to say that further development on a case by care basis may not in course of time added further grounds. Lord Diplock further elucidated the concepts by illegality as a ground for judicial review. I mean that the decision maker must understand correctly the law that requires his decision making power and give effect to it. Whether he had or not is par excellence a justifiable question to be decided, in the event of dispute, by whose persons, the judges, by whom the judicial power of the state as exercisable.**

By irrationality I mean what can be now be succinctly referred to as Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have a mind at it. Whether a decision falls within this category is a question that judges by their finding and expedience should be well equipped to answer.

I have considered the third head as procedural impropriety rather than failure observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by the administrative tribunal to observe the procedure rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even these such failure does not condone any denial of natural justice. That is not to say that further development on a case by case basis may not in course of time add further grounds."

I have in mind particularly the possible adoption in the failure of the principle of proportionality which is recognized in the administrative law. In the case of ***Republic v. Judicial Service Commission ex-parte Stephen Pareno Misc. Civil application No. 1025 of 2003*** adopting the test from the Supreme Court practice 1995 volume 1 paragraph 5311 – 1416 essentially applying the same approach like Lord Diplock stated as follows:

"That remedy of Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that is no part of that purpose to substitute the opinion of the judiciary of or individual judges for that of the authority constituted by law to decide the matters in question"

In every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary of over individual judges with that of the authority by law to decide the matter in question ***Chief constable of North Wales, Police v Evans 1982 1 WLR 1155 page 1160 (1982) 3 ALL ER 141, page 143 per Hailsham LC.***

"Thus a decision of an inferior court or public authority may be quashed by an order of certiorari made on an application for judicial review, where that court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury's sense. The court of appeal will however on a judicial review application act as a court of appeal from the body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty itself of usurping power"

In the course of the oral submissions before me by learned counsel Mr. Itaya it became clear that he took the approach of judicial review due to the following reasons, first to urge this court to accept that the learned trial magistrate acted in excess of jurisdiction and as a result there was denial of fundamental justice. Mr. Itaya further submitted that Section 68(1) of the Kenya forest and conservation Act on forfeiture uses the word may which is permissive in nature. Counsel argued and submitted that the owner of the vessel was never called upon to show cause why it should not be forfeited to the state for committing the offence of trespassing and conveying the illegal forest produce. In this regard learned counsel invited the court to exercise supervisory jurisdiction to issue writs of prohibition and certiorari against the order on forfeiture of the motorcycle.

The principle which runs through the cited cases endorses the legal position that where a court has the jurisdiction in a dispute but for one reason or another declines to exercise it or assuming the jurisdiction misapprehends the law, the decision would be subject to the judicial review remedies.

In the instant case the gist of the complaint by the applicant is the failure by the learned trial Magistrate not to apply the provisions of Section 68 (b) of the Act to the latter. It is clear from the order that the trial magistrate fell into error when determining two issues on forfeiture; First was the forfeiture of illegal forest produce which in law attracts an automatic order of forfeiture for any defendant convicted of the offence under section 64 of the Act. Secondly, section 68 of the Act expressly provides for compensation to the conservator of Kenya Forest Services for the harm done to the forest to be assessed by the court. Thirdly, the vessels, article, vehicle used in the commission of the crime specified under section 64 is subject for forfeiture by the courts through the laid down procedure in section 68 of the Act. This provision on forfeiture of a vessel article, motor vehicle etc used in committing the crime is peculiar in the sense that it clothes the court with the power and authority to conduct mini trial to establish ownership and involvement of the seized article, vessel or vehicle and its correlation with the offence.

Bearing in mind all this was the decision made by the learned trial magistrate on 4th April, 2018 to forfeit the motorcycle to the respondent made according to law?

In my reading of Section 68 of the Act on its true construction and criteria set to authorize forfeiture in reference to a third party not part of the pending proceedings the answer is no. It is necessary to refer to the principal elements on procedural ultravires In the case of ***Anisminic Ltd v Foreign compensation commission 1969 All ER 208 2 AC 147*** the court noted:

"There are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it

power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly"

The courts have further held that where statute provides for a characteristic test illustrating how the decision making is to be achieved by the decision maker adherence to the principles of natural justice is mandatory. In the case of ***Ronald Muge Cherogony relief of General Staff of the Armed Forces and other (misc. cause No. 671 of 1999)*** the court captures the essence of this approach when it held as follows:

"Where the law lays down a particular procedure for the doing of an act, such procedure may be construed to be directional or mandatory. If it is directional, then it is meant to be a guideline and a departure therefore is not necessary fatal to the validity of the decision making process. However, if it is mandatory then any departure renders the ultimate decision null and void"

As submitted by learned counsel the applicant is aggrieved that his motor cycle a source of income was forfeited to the state without being given an opportunity to be heard by the court. What learned counsel is urging this court to do is to prohibit any further action against the application by quashing the decision of the learned trial magistrate. It is not in dispute that the applicant had a legal and beneficial interest over the forfeited motorcycle.

In this case herein lies the key to the court's interpretation of section 68 of the Act visa viz the impugned order. The section is to be read as a whole to establish every additional remedy possible besides the mandatory punishment as expressly stated in section 64 of the Act. The specific provisions of section 68 requires that regard be made to the breach and violation of section 64 which creates category offences. Thus the offender has to compensate the conservator of forests equivalent to the value of the damaged forest produce. When it comes to the employer or third party who might have a legal right or interest identified in the statement of the offence and the particulars produced with it before imposing penalties including forfeiture sufficient cause must be shown by that other person.

The principle elements of section 68 on forfeiture are the right to be heard, due process and neutral umpire to guard against any deprivation of an individual right to property arbitrarily as expressly stated in Article 40 of the constitution, without unduly observance of the rules in natural justice.

There can be no doubt that section 68 of the Act introduces the aspect of the right to a fair hearing and due process requiring a third party who may have a legal interest or right in the vessel or article in the pending or about to be concluded judicial proceedings to be served with a notice to be heard before any adverse decision affecting his rights are made. The aspect of due process and the procedure to sufficiently address matters arising after conviction and sentence of the offender as covered by the Act on compensation and forfeiture have been left authoritatively to be determined by the trial court.

From the record and impugned order the following substantial issues directed at the order are clear that there was no adjudication and hearing on forfeiture conducted by the trial magistrate. In essence the state never made an application to trigger forfeiture proceedings which resulted in the order by the learned trial magistrate. The purported forfeiture made against the applicant occurred when neither party had prayed for it and when there was no sufficient evidence on which to base the decision. There was failure by the trial magistrate to comply with the provisions of section 68 of the Act as read together with section 389A of the criminal procedure code.

The learned trial magistrate erred and failed to appreciate that ownership of the motorcycle had not been established and the registered or beneficial owner were not present in court to properly deal with the issue at hand. The relevant statute requires that as a condition for forfeiture that other party sufficiently be heard to the satisfaction of the court.

In my conceded view the learned trial magistrate appears to have misconstrued section 68 of the Act thereby erred in the nature of the function and discretion she was to exercise in granting the orders on forfeiture in the circumstances of the particular case before her.

The final point that deserves mention is in reference to the impugned order which on examination fails the test of section 4 of the fair administrative Act. It contains subtle constitutional considerations of the duty to give reasons for the decision.

This legal position which has relevant to the broader rule of law on administration of justice was underpinned in the decision of the ***Committee on the Administrative Tribunals and Enquiries 1957 ALL ER 24, 75***

"It is fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. Where no reasons are given, the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the --------decision in the courts or elsewhere. Moreover as we have already said in relation to tribunal decisions, a decision is apt to be better if the reasons of it have to be set out in writing because the reasons are then more likely to have been properly thought out"

What did the framers of the constitution have in mind when enacting Article 50(1) of the constitution? Further the constitutional scheme under Articles 27,28,47, 48 and 50 stands a clear pathway to promote and protect any denial or violation threat to a right to a fair hearing, equality, access to court and fair administrative action before a court or independent and impartial tribunal. The jurisdiction of courts is vested and exercised by the benches of magistrate's courts, tribunals and superior courts as defined in Article 162, 163, 164, 165 169 of the constitution. Relying in these provisions it is the holders of the respective offices who shall be competent to deal with disputes arising under

the various jurisdictions as vested in a particular statute.

In the present case the adjudication process and responsibility was upon the learned trial magistrate to ensure that the procedure by which such discretion is exercised and to give assurance that the application has been dealt fairly.

In the case of ***Oreilly v Mackman 1973 3 ALL ER 680 the house of Lords*** stated in the context of exercise of power in a judicial or quasi capacity and application and the application of rules of natural justice. Where it was observed interalia:

> **"That it is not a question of acting or being required act judicially but of being required to act fairly. Good administration and on honest bona fide decision must, as it seems to me, require not merely impartiality nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislature framework under which the administrator is working, only to that limited extent do the so called parties of natural justice apply, which in case such as this is merely a duty to act fairly"**

Following the above decision the trial magistrate was mandated in the usual manner to act fairly and be seen to act fairly by giving the applicant who was to be affected by the order to know of the significance and allow him a chance to put his defence or objection to the claim before action may be taken. In this regard I must interfere with the order and declare the learned trial magistrate decision and order was null and void.

As a consequence the order must be set aside as of right and substituted with the following orders:

1. ***That an order of certiorari be and is hereby issued removing into this court and quashed the decision of the Chief Magistrate Kajiado Hon. Shitubi made on 4th April, 2018 in Criminal Case No. 491 of 2018 forfeiting Motor Cycle Registration No. KMDW 746 D.***

2. ***That an order of prohibition be and is hereby issued directed at the Kenya Forest Service prohibiting them from selling Motor Cycle Registration No. KMDW 746 D.***

3. ***That Motor Vehicle Registration No. KMDW 746 D be released to the ex-parte applicant.***

Dated, signed and delivered in open court at Kajiado this 17th day of July, 2018.

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R. NYAKUNDI

JDUGE

In the presence of:

Mr. Meroka for the state and 3rd respondent

Mr. Itaya for the ex-parte applicant