



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

PETITION NO. 6 OF 2018.

ELIUD MAKOKHA WEKESA.....APPLICANT

VERSUS.

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COUNTY DIRECTOR OF FORESTRY.....2ND RESPONDENT

THE DEPUTY PUBLIC PROSECUTOR.....3RD RESPONDENT

AND.

HON. PATRICK WANGAMATI.....1ST INTERESTED PARTY

DANIEL WEKESA.....2ND INTERESTED PARTY

PETER WANJALA.....3RD INTERESTED PARTY

RULING

The petitioner Eliud Makokha Wekesa filed this Petition dated 24th May, 2018 seeking a declaration to issue that the arrest of the 2nd and 3rd Interested Party, the Criminal Charge preferred against them in **Bungoma Chief Magistrates' Criminal Case Number 2018** and all consequential Orders, decisions, and directions affecting **the 1st and 2nd Interested Parties' rights**, the **Petitioner's Lorry KCF 371E Isuzu FRR**, and the **1st Interested Party's 180 Eucalyptus Poles** was unlawful, arbitrary and made without just cause, and that the decisions, orders proceedings, directions, made in Bungoma Criminal Case No. 691 of 2018, be brought forth into this Court and by an Order of Certiorari issued hereby, the same be quashed.

The petitioner avers that the Respondents have violated the Petitioner's constitutional rights and in particular Article 40 of the Constitution in regard to his property in Motor Vehicle Reg. No. KCF 371E which was impounded and detained when no offence was convicted at all; Article 50 as he was not given a fair hearing; Article 49 (1)(a) by imposing prohibitive Cash Bail and infringing his rights to fair Administrative Action. He therefore prays this court to grant the prayers sought. Simultaneous to the filing of the petition, the petitioner filed application by way of Notice of Motion seeking orders that the Honourable Court be pleased to issue a Conservatory Order directing that the Motor Lorry Registration No. KCF 371E ISUZU FRR forthwith be released to the applicant ELIUD MAKOKHA WEKESA SUBJECT however to the direction that whenever the trial Court shall require it for purposes of evidence in the trial Court the applicant shall without fail avail it to Court for such purposes.

The application is premised on the grounds that;

- i. The subject matter herein a Motor Lorry KCF 371E Isuzu FRR is the property of the applicant ELIUD MAKOKHA whereof he is jointly registered with Equity Bank as Lender.
- ii. In the Month of May this year, Enforcement Officers from the Department of Forest Management and Conservation Act, impounded the Motor Lorry KCF 371E in connection with an alleged offence of movement of Forest produce to wit 180 Eucalyptus Logs without a permit.
- iii. The Applicant was not aware of the use for which the hirer was applying his lorry nor was he made aware of the need to have regulatory permission.

iv. The 1st Interested Party was furnished with Letters confirming ownership of the trees and Logs to be transported, both from the Area Chief, Luuya Bwake, and the Bwake Luuya Ward Administrator as to ownership and origin of the forest produce.

v. The proprietary rights of the applicant under **Article 40** of the **Constitution of Kenya 2010** have been violated by the impoundment and retention of the Motor Lorry aforesaid.

Mr. Oimbo appearing for the director of Public Prosecution the 3rd Respondent opposed the Petition on the grounds that;

1. THAT *the matters raised in so far as the framing of the charges is concerned can be cured in the trial Court through an amendment of the Charge Sheet as provided for under Section 214(i) of the CPC.*

2. THAT *the Petition is an abuse of the Court process since the Petitioner who is not party to the Criminal Proceedings in CR. 691/2018 is prosecuting the said matter defending himself through this petition instead of waiting to do the same in the trial court where he has been charged.*

3. THAT *the bond terms given to the accused persons is reasonable and commensurate to the offence.*

The factual basis of this petition are that Petitioner is owner of Motor Vehicle Reg. No. KCF 371E Isuzu FRR Lorry. The petitioner has employed one Daniel Wekesa the Interested Party as a driver and Manager. On 16.5.2018 he was engaged to ferry Poles to take to a site in Kanduyi. While carrying the Poles along Khachonge – Sikula Roso he was stopped by Kenya Forest Service Officers who demanded a Movement Permit for the Poles he was carrying. They did not have the Permit but showed them letters they had from one Mzee Wangamati which they rejected. They were arrested, taken to the police station and on 18.5.2018 charged in Bungoma Court with the offence of transporting Forest produce without a movement permit. They denied the charge and were released on Cash Bail of Kshs.200,000/= which they paid. The Motor vehicle was impounded pending hearing of the Criminal case. The petitioner applied for release of the vehicle but the court directed the lorry to remain in police custody.

Feeling aggrieved by the order to detain the Motor vehicle, he filed this Petition stating that the Motor vehicle was purchased with financing from Equity Bank where he is obliged to pay Kshs.75,000/= per month and that the continued impounding of the vehicle he stands a risk in de-facilitating the on payment and the vehicle being repossessed, and this will be a violation of his property rights under the Constitution.

Mr. Wasilwa learned Counsel for the petitioner filed Written Submission in support of the Petition. He submitted that the offence the driver of the Motor vehicle KCF 371E is charged with does not exist in law as neither Section 64 or 65 or any other provision of the Forest Conservation and Management Act contain a charge of Transporting Forest produce without a movement permit. That being so, Counsel submits the charge is defective. Further, Counsel submits and relies on authorities where court decided that forfeiture of property can only be done if the property belongs to the accused person.

Mr. Oimbo for the State in his written submissions contended that the petitioner in this Petition is not an accused or party in Bungoma CMCR. 691/2018 and therefore cannot purport to move this court to grant prayers sought; that Section 68(1) C of the Forest Conservation & Management Act provides that the vessel Vehicle, tools or implements used in the offence can be forfeited to state; that Motor vehicle Reg. No. KCF was used in the Commission of an offence and is in Custody of Police as Exhibit; and finally the error in the Charge Sheet is curable under Section 214(1) of the Criminal Procedure Code.

From the submissions by Mr. Wasilwa for the petitioner, the Petition is challenging the impounding of the Motor vehicle which the police allege was found within the forest produce. He contends that the impounding of the vehicle and the charging of the Interested Party in the Magistrates Court is a violation of his rights under the Constitution.

It is not in contest that the Interested Parties are facing a charge before the Magistrates Court; where they pleaded not guilty and were released on bond. It is not dispute that the vehicle Reg. No. KCF 371E is named as a vessel/vehicle for transporting the Forest produce. It is therefore an exhibit in the trial. In my view, a person charged with Criminal offence before a competent court cannot say that his rights have been violated unless it is shown that the arraignment in court was actuated by malice and not in pursuance of justice. No such evidence has been placed in this petition. In my finding the Interested Party being charged in court is a legal process which I am unable to find is in violation of the Petitioner's rights under the Constitution.

I therefore find no Merit in this Petition which is hereby dismissed.

Dated and Signed at Bungoma this 9th day of October, 2018.

S.N. RIECHI

JUDGE