



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 54 of 2012

JOSEPH KURIA GITHINJI PLAINTIFF

VERSUS

KENYA FOREST SERVICE DEFENDANT

RULING

By a notice of motion dated 29th February 2012, made pursuant to **Order 40 Rule 1, 2, 3** of the **Civil Procedure Rules** and **Section 3A Civil Procedure Act**, the applicant seeks that:

- (a) Pending hearing and determination of this suit, an order of mandatory injunction compelling the defendant/respondent to reinstate and return the plaintiff/applicant's merchandise, being 156 doors, 200 frames and 4 tonnes of cypress timber which were carried from the applicant's timber yard.
- (b) An order of injunction do issue restraining the defendant by itself and/or its servants or agents from harassing and intimidating the plaintiff.

The applicant describes himself as a registered and licenced timber merchant running a timber yard at KIHINGO area in Njoro. He purchases timber from other timber merchants who have movement permits, since he doesn't possess one. He states that what he has is a yard, not a mill, yet on 26th February 2012, officers from the defendant carried away the items whose release he now seeks, using motor vehicle registration No.GKA 840. Prior to the incident, he has not been issued with any notice invalidating his business nor has he been warned about conducting the said trade.

He describes the action as being actuated by malice and deposes that that a *prima facie* case with probability of success has been established.

He has annexed receipts issued to him by the County Council of Nakuru in respect of the timber yard.

In a replying affidavit sworn by **OSBORN LWOYELO NDUNDE**, the application is opposed on grounds that it is misconceived and amounts to abuse of court process. The Respondent is described as a State Corporation whose mandate is to manage all State forests, water catchment areas, enforce the conditions and regulations pertaining to logging, charcoal making and other forest utilization activities under the Forest Act 2005.

Further, that two forests namely Teret and Logoman are situated within the Mau Conservancy which is part of the larger Mau water catchment area, and the defendant has a duty to protect and conserve the forests. It is the respondent's contention that many forests countrywide have suffered threats from

encroachment including extensive excision of forest land, illegal logging, charcoal burning and human settlements.

On 26/12/2012, the Defendant's officers received reports that an unidentified lorry was transporting timber from Teret Centre towards Kihingo. On arrival at Kihingo, which borders Teret Forest, the officers stopped to inspect various premises, including the plaintiff's premises and recovered several piles of timber locked behind a high iron sheet fence.

On being requested to produce documents authorizing him to possess the timber, applicant had none. The officers also realised that applicant was operating a mill under the guise of a workshop. He completely refused to co-operate with the defendant's officers and locked up his premises. The officers were compelled to leave the scene and no timber or merchandise was seized.

The application is termed as intended to pre-empt any enforcement order contemplated by the Respondent.

The matter was disposed off by way of written submissions in which applicant's counsel states that a power line which runs cross the applicant's timber yard is single phase and not three phased – meaning it can only operate a yard and not a mill. Counsel acknowledges that Respondent's agents have legal authority under **Section 50 of the Forest Act** to require a person found with any forest product suspected to be taken from the forest, to give an explanation regarding the possession, and where the explanation is not satisfactory then the person ought to be arrested and charged.

It is argued that since applicant has not been arrested or charged, then the seized merchandise should be returned to him. The Respondent's counsel submits that no *prima facie* case has been established since there is nothing to demonstrate that the merchandise was taken away, so no loss has been suffered, and it was within the respondent's mandate to inspect the premises so no loss or irreparable harm will be suffered if the premises are duly inspected, and there can be no reason to issue an injunction.

I have considered the material evidence placed before this court. I have also considered the written submissions by counsel, and it is apparent that:

1. There is nothing whatsoever to demonstrate to me that the said merchandise have been taken away from the premises.
2. Even if they were not taken away, then nothing has been presented to this court to show what prejudice applicant will suffer by allowing the Respondent to inspect the premises. Such inspection is within the Respondent's mandate and has the full backing of the law as provided under the Forest Act.
3. Even on a balance of convenience, the scales do not tilt in favour of the applicant.

The upshot is that the application has no merit and is dismissed with costs.

Delivered and dated this 9th day of October, 2012 at Nakuru.

H.A. OMONDI

JUDGE