



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2018**

**JOEL MADAHANA.....APPLICANT**

**VERSUS**

**DIRECTOR OF FOREST SERVICES.....RESPONDENT**

**RULING**

**[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 20<sup>TH</sup> SEPTEMBER, 2019]**

1. The Respondent moved the Court vide the Motion dated 20<sup>th</sup> September, 2019, seeking for the order issued on 4<sup>th</sup> May, 2019 and extracted on 14<sup>th</sup> May, 2018 to be reviewed and or set aside. The application is based on the ten **(10)** grounds on its face and supported by the affidavit sworn by **Benjamin M. Kinyili**, the Assistant Chief Conservator of Forest and Head, North Rift Conservancy of the Kenya Forest Service, sworn on the 20<sup>th</sup> September, 2019. It is the Respondent's case that the Applicant's Motion dated the 17<sup>th</sup> April, 2018 had not been served as alleged in the undated affidavit of service sworn by **Kenneth Oduor**, and filed on the 20<sup>th</sup> April, 2018 and that by **Godfrey Masinde Sitati** sworn on the 4<sup>th</sup> May, 2016. That the officer named **Solomon Mibey**, alleged to have been served on the 20<sup>th</sup> April, 2018 had retired on the 4<sup>th</sup> April, 2016 and hence could not have received summons or be available as a witness for the Respondent. That there is no evidence of posting of the hearing notice to the Respondent's Nairobi office.

2. The application is opposed by the Applicant through the Replying affidavit sworn by **Joel Madahana** on the 18<sup>th</sup> October, 2019. That it is his case that he is a licensed charcoal dealer who harvests charcoal from his farms in Eldoret, Kitale and from leased farms for many years. That towards the end of January, he harvested 19,000 bags of charcoal valued in excess of Kshs.20,000,000 and moved the Court for an order to transport it to Kakamega and Kisumu. That he obtained the order on the 4<sup>th</sup> May, 2018. That he moved to the court due to the fact that Kenya Forest Service could not issue him with the permit to transport the charcoal due to the moratorium of 28<sup>th</sup> February, 2018 and the leases over the leased farms had lapsed. That the order cannot be reviewed by this court as it had been issued by **Ombwayo, J.** That the service upon the owner of mobile 0723393737 was effected and that is how the process server got that number.

3. The learned Counsel for the Respondent and Applicant filed their written submissions dated the 5<sup>th</sup> November, 2019 and 9<sup>th</sup> May, 2020 summarized as follows;

**A. RESPONDENT'S SUBMISSIONS**

- That the Respondent got to know of the existence of these proceedings on the 13<sup>th</sup> September, 2019 when some people were intercepted ferrying charcoal without the requisite licenses and permits from Kenya Forest Services.
- That the Court has powers to review and set aside the orders where it is proved the applicant had not been served.
- That **Section 80 of Civil Procedure Act and Order 45 of the Civil Procedure Rules** provides for review upon discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason. That **Order 10 Rule 11 of Civil Procedure Rules** allows the setting aside of default judgment.
- The learned Counsel referred to the case of **Naran Vs Velji Ramji (1954) 21 EACA 20**, in support of their submission that the Court has jurisdiction to review orders obtained exparte where it is proved no service had been effected.
- That this Court is without jurisdiction to grant the orders sought by the Applicant as there was no dispute between the parties as envisaged under **Article 162 (2) (b) of the Constitution and Section 13(1) and (2) of the Environment and Land Court Act** by the time the Applicant moved the court through the Miscellaneous application.

· That **Regulation 14(3) of the Forest (Charcoal) Rules, 2009** bestows the Respondent with authority to issue charcoal movement licenses upon payment of the prescribed fee. That in this case where the Applicant alleges he had 19,000 bags, the licence fee that would have gone to the public coffers was Kshs.380,000.

· That the Miscellaneous application was prematurely filed before exhausting the statutory mechanisms under **Section 70(1) of the Forest Conservation and Management Act No. 34 of 2016**. The learned Counsel referred to the case of **Republic Vs Principal Magistrate, Lamu and Another Ex-parte Kenya Forest Service [2016] eKLR**, where *Emukule, J* reiterated that though every litigant has a right of say in court under **Article 48 of the Constitution**, the Court's jurisdiction in certain matters or instances can be ousted or restricted by statute, and held that **"...where an enabling statute provides for an alternative remedy which is equally efficacious, and the applicant opts to file suit or come to court, such action will be misconceived..."**

· That Director of Forest Services, the named Respondent, do not exist in law and therefore the order was issued against a non-existent party.

That the **Forest Act** under which the Director Forest Service was an office was repealed by the **Forest Conservation and Management Act** that came into force on the 31<sup>st</sup> March, 2017 which is a year before the Applicant moved the court. That there is an error on the face of the record as a non-existent party cannot obey the order. That the Applicant failed to disclose that fact to the court. That the Applicant is not a licensed commercial producer and had not applied for a permit under **Regulation 9(2) of the Forest (Charcoal) Rules, 2009**.

## **B. APPLICANT'S SUBMISSIONS**

· That the Respondent lacks the locus standi to file and prosecute the application as it has not properly applied to be enjoined, in this matter in accordance with **Order 1 of the Civil Procedure Rules**. The learned Counsel referred to the case of **Apex International Limited & Anglo Leasing and Finance Ltd Vs Kenya Anti-Corruption Commission (2012) eKLR**.

· That the Court should aim to do substantive justice in accordance with **Article 159(2) of the Constitution** as held by the **Supreme Court in Raila Odinga & Others Vs Independent Electoral and Boundaries Commission & Others Nairobi Petition No. 5 of 2013 [2013] eKLR**. That the mistake of having the supporting affidavit to the principal application commissioned by **Nicholas Rono** should not be visited upon the Applicant as being a layman he could not have known whether or not he was a Commissioner of Oaths.

· That the Court has jurisdiction to hear and determine the Applicant's application as is not challenging the moratorium, but seeking the Court's assistance to transport the charcoal.

· That during the cross examination of Benjamin Kinyili, it became apparent that he was served. That the deponent of the supporting affidavit to the current application had no capacity to swear it and is in contravention of **Order 19(3) (1) of the Civil Procedure Rules**, which require the deponent to swear to facts within his knowledge.

4. The following are the issues for the Court's determinations;

*(a) Whether the Respondent has made a reasonable case for reviewing and or setting aside the order of 4<sup>th</sup> May, 2018.*

*(b) Whether the Respondent is a legal entity capable of being sued.*

*(c) Who pays the costs?*

5. The Court has carefully considered the grounds on the Motion, affidavit evidence, the oral evidence of Benjamin Kinyili upon cross examination and re-examination on his affidavit, the learned Counsel's submissions, the record and come to the following findings;

(a) That the Applicant commenced these proceedings as a Miscellaneous Application in which the Motion under Certificate of Urgency dated the 17<sup>th</sup> April, 2018 was filed. The application seeks for **"an order allowing the Applicant to transport charcoal harvested on the Applicant's farms in Eldoret and Kitale before moratorium from the Respondent was issued on 28<sup>th</sup> February, 2018."** That the record shows that the learned Counsel for the Applicant appeared ex parte before the Court on the 17<sup>th</sup> April, 2018 and an order to serve the application in two days for hearing on 20<sup>th</sup> April, 2018 was issued.

(b) That on record is the undated affidavit of service that is sworn by **Kenneth O. Oduor** filed on the 20<sup>th</sup> April, 2018 deponing that he served Solomon Mibey on 17<sup>th</sup> April, 2018 with the application dated the 17<sup>th</sup> April, 2018 that was for hearing on 20<sup>th</sup> April, 2018. That the said Solomon Mibey declined to sign in acknowledgment. That though the said Solomon Mibey is alleged to have been the **"Chief Conserving Forest Officer, In-charge, North Rift region"**, the Respondent has through the affidavit sworn by **Benjamin M. Kinyili**, the Assistant Chief Conservator of Forests and Head North Rift Conservancy, disputed that fact stating that the said Solomon Mibey used to be **"an Assistant Chief Conservator of Forest North Rift Region from 1<sup>st</sup> April, 2010 to 5<sup>th</sup> April, 2016 and that he handed over to Mr. D. G. Ndiritu on the 5<sup>th</sup> May, 2016 and could not therefore have ben in office on 20<sup>th</sup> April, 2016, when the said process server alleged to have effected service upon him."** That this deposition has not been disputed or challenged through a further affidavit. That the Court therefore concludes that the application had not been served upon the Respondent by the time the order of 4<sup>th</sup> May, 2018 and extracted on the 14<sup>th</sup> May, 2018 was made.

(c) That on the record shows that on 20<sup>th</sup> April, 2018 the Court ordered for summons for the Chief Conservator of Forest North Rift region to be issued to come to court on the 27<sup>th</sup> April, 2018. That there is no copy of summons on record issued for the Respondent to come to Court on the 27<sup>th</sup> April, 2018. That though he Applicant depones at paragraph 15 of the Replying affidavit that the summons was served in his presence, that of his Counsel and other friends by the process server in their company on the 27<sup>th</sup> April, 2018, there is no affidavit of service filed to that effect as required by **Order 5 Rule 15 of Civil Procedure Rules**. That in any case, the Court wonders how the summons that were requiring the Respondent to attend Court on the 27<sup>th</sup> April, 2018 could have been served on the day of the hearing. That the record has a copy of summons issued on 3<sup>rd</sup> May, 2018 which must have been the one issued pursuant to the Court order of the 27<sup>th</sup> April, 2018. There is however no evidence of service of the said summons as the affidavits of services by **Godfrey Masinde Sitati** and **Stanley N. Kagunza** sworn on 4<sup>th</sup> May, 2018 were of service of a hearing notice for 4<sup>th</sup> May, 2018. That there is no Certificate of posting annexed to the affidavit of service of Stanley N. Kagunza, through which the Court can confirm that the posting through Registered Post was indeed done on 2<sup>nd</sup> May, 2018 and to the correct address as claimed. That nevertheless having considered the affidavit of service of Godfrey Masinde Sitati, and the oral evidence of Benjamin Kinyili during his cross examination, the Court is unable to determine what document was served. The said affidavit at paragraph 2 and 3 refers to the process server having on 27<sup>th</sup> April, 2018 **“received a copy of a hearing notice listed for hearing of Applicant’s application dated 17<sup>th</sup> April, 2018 listed for hearing on 4<sup>th</sup> May, 2018 and summons to witness...”** The process server goes ahead to depone that he served **“the aforesaid documents to the Chief Conserving Forest Officer In-charge, North Rift region of No. 0723393737”**. That though the person served is said to have declined to sign, the copies of the documents subject matter of the service have not been annexed to the affidavit for the Court to confirm what documents they were, in view of failure by the process server to detail them clearly. That in case the affidavit of service was for documents including summons for hearing on 4<sup>th</sup> May, 2018, there is none that had been issued for that day before 3<sup>rd</sup> May, 2018 and that could not have been the one referred in that affidavit of service. That the foregoing leads the Court to conclude that there was no service, or proper service of the summons to witness, and hearing notice for the Respondent and or Benjamin Kinyili, to attend Court on the 4<sup>th</sup> May, 2018 as alleged.

(d) That it was therefore misleading for the Applicant to have told the Court on 4<sup>th</sup> May, 2018 that service had been effected, and that there was no response. That as the Respondent has established that the order of 4<sup>th</sup> May, 2018 was obtained without the Respondent being served with the application, summons to witness and hearing notice then they deserve the order to be reviewed to enable them be heard in accordance with **Article 50 of the Constitution**.

(e) That had the fact that the application, summons and hearing notice had not been actually served disclosed to the court on the 4<sup>th</sup> May, 2018, the order issued would not have been granted without according to the Respondent the opportunity to be served and to decide whether or not to defend the application. That as *Ombwayo, J* who issued the order on 4<sup>th</sup> May, 2018 left the station for Environment and Land Court, Kisumu in September, 2019, this Court is with jurisdiction to hear and determine the application under **Order 45 Rule 2(2) of Civil Procedure Rules**.

(f) That indeed, the **Forest Act 2005**, which had the Director of Forest Service was repealed under **Section 76 of the Forest Conservation and Management Act No. 34 of 2016**, which came to operation in 2017. That the Conservator of Forest of the Kenya Forest Service was established under **Section 14(1) of the Forest Conservation and Management Act**. That the transition section under **Part XI of the Act** do not in any way provide for the Director of Forest Service as an office to continue in existence after the repeal of the **Forest Act**. That accordingly, the party named as the Respondent when this proceedings was filed did not exist.

(g) That the Applicant had not applied for the licence or permit from the Chief Conservator of Forest before coming to Court as submitted by the Respondent. That the application is therefore premature, which fact would not change even if the application by the Applicant dated 17<sup>th</sup> April, 2018 is heard afresh, after granting the Respondent’s Motion.

(h) That the Respondent has availed a letter from the Law Society of Kenya dated 2<sup>nd</sup> December, 2019 confirming that Ronoh Nicholas Kiprotich Advocate **“is not duly appointed as a Commissioner of Oaths”**, and last took out practicing certificate in 2017, and **“is therefore NOT certified to practice law”**. That the said Ronoh Nicholas Kiprotich is the one who allegedly commissioned the Applicant’s supporting affidavit sworn on the 17<sup>th</sup> April, 2018 when not appointed as a Commissioner of Oath and not certified to practice law. There is therefore no affidavit before the Court capable of supporting the Applicant’s Motion under Certificate of Urgency dated the 17<sup>th</sup> April, 2018.

(i) That in view of the finding in (h) above that the Notice of Motion dated 17<sup>th</sup> April, 2018 is without a valid supporting affidavit, the application should be struck out with costs.

6. That flowing from the foregoing, the Court orders as follows;

(a) That the Respondent’s Notice of Motion dated 20<sup>th</sup> September, 2020 has merit and is allowed as prayed with costs.

(b) That having found that the Applicant’s Notice of Motion dated the 17<sup>th</sup> April, 2018 is without a valid supporting affidavit, the said application is hereby struck out with costs.

Orders accordingly.

**Delivered virtually and dated at Eldoret this 9<sup>th</sup> day of December, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Applicant: Absent.

Respondent: Absent.

Counsel: Mr. Oduor for Respondent.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.