



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CIVIL APPEAL NO. 23 OF 2019

KENYA WILDLIFE SERVICE.....APPELLANT

VERSUS

SIHUA INDUSTRY ALLIANCE CO. LTD.....1ST RESPONDENT

THE COUNTY CONSERVATOR.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

THE DIRECTOR PUBLIC PROSECUTION.....4TH RESPONDENT

JUDGEMENT

1. This appeal was brought by Kenya Wildlife Service against the whole of the decision of Hon. Mutunga SRM delivered on 27th November 2018. The appellant in his memorandum of appeal dated 29th November 2018 listed the following as his grounds of appeal;

- a. That the learned trial magistrate erred in law and act in ordering the interested party to release the consignment.**
- b. That the learned trial magistrate erred in law and fact in disregarding the interested party's written submissions.**
- c. That the learned magistrate erred in law and fact in holding that the Convention of Illicit Trade of Endangered Species (CITES) is not applicable in this case.**
- d. That the learned magistrate erred in law and fact in holding the plaintiff/respondent had the right of ownership over the consignment despite the overwhelming evidence to the contrary.**

2. The appellant filed a record of appeal dated 15th April 2019. Later, the 1st Respondent also filed a supplementary record of appeal on 29th April 2019 to include the missing documents. On 30th April 2019 when directions were taken on how to proceed with hearing of the appeal, I ordered that the lower court file be availed but the order was not acted upon. I am therefore writing this judgement based on the documents made available by the parties.

3. The appellant and the 1st Respondent filed two sets of submissions second set on 7th and 10th May 2019. For the appellant, her submissions were filed on 26th April 2019. For the 1st Respondent, the first one was filed on 29th April 2019 and second set on 10th May 2019. Mr Wachira-Nguyo, State Counsel appearing for the 2nd and 3rd respondents adopted his submissions filed before the trial court. He also informed this court that the 2nd and 3rd Respondents were supporting the appeal.

4. I have read the submissions as rendered and will make references to them in the body of this judgment. From the pleadings I frame the following questions for my determination;

- i. Whether the impugned consignment formed part of the endangered species as at the time of preparing the bills of lading.**
- ii. If yes, whether the 1st Respondent had the requisite document to tranship them.**
- iii. Did the trial Magistrate misinterpret the applicable law in ordering for the release?**

iv. Who bears the costs of the appeal?

5. The appellant argued that the learned magistrate erred in law and fact in ordering them to release the consignment on the basis that the Convention on Illicit Trade of Endangered Species (CITES) was not applicable to this case. I have discerned from the affidavit of Mr Jackson Munyanga No. 7648 of Kenya Wildlife Service that the consignment in dispute was confirmed by the National Museums of Kenya on 2nd March 2018 to belong to the genus *Dalbergia* (rose wood) which is protected under appendix II of CITES.

6. What did the learned magistrate have to say? The magistrate found that he had jurisdiction to entertain the matter by virtue of the provisions of Section 9 of Magistrate Court Act. The Magistrate noted that the bill of lading as per the documents presented by the applicant was authorised by the Republic of Madagascar and dated 1st April 2014 whereas the seizure of the cargo was done in May 2014. That before the seizure, the species named was still under Appendix III of the CITES an issue that is not in dispute from all parties herein. Hon Mutunga further held that *Dalbergia SPP* was only classified under CITES Appendix II on 4th October 2017 thus requiring the applicant to show the permits for any authorization for reshipment from Kenya to Hong Kong.

7. So was the Magistrate wrong to find that the CITES did not apply to the consignment at the time of lading? CITES was operationalized on 1st July 1975. On 22nd June 1979 Kenya became a signatory to the Convention. Before 24th September 2016, the Rosewood species was categorised under Appendix III CITES. It was moved to Appendix II following the 17th Conference of Parties (CoP) held between 24th September-4th October 2016 in Johannesburg South Africa. The application under Appendix II was operationalized on 2nd January 2017. The flora and fauna listed under Appendix II include **“species not necessarily threatened by extinction but in which trade must be controlled in order to avoid utilization incompatible with their survival.”**

8. The consignment did not fall under the category of species under Appendix II at the time it was confiscated on May 2014. Further even if the Appellant felt they belonged to the species under Appendix II (which is not true), the 1st Respondent was only expected to show that she had the requisite permit for the transshipment as Trade on flora and fauna under Appendix II was not completely banned.

9. The appellant submitted that at the 16th CoP in Bangkok in 2013 held on 3rd-4th March 2013, the CoP agreed on the inclusion in Appendix II of the **Malagasy Population of the genera *Delbergia* & *Diospyros***; with annotation to restricting the listing to **“logs, sawn wood and veneer sheets”**. Therefore according to the Appellant, when the goods were seized in April 2014, they were already categorised under Appendix II. *Decision 16.152* of 16th CoP is worded thus, **“The CoP has adopted the Action Plan attached as Annex 3 to these decisions to facilitate adequate implementation of the Appendix II listings of *Diospyros SPP* (Population of Madagascar) and *Dalbergia SPP* (population of Madagascar).”**

10. This court has looked at what annex 3 (Action Plan for *Diospyros SPP* and *Dalbergia*) provided. The opening words are;

i. Madagascar shall....

ii. The Plants Committee shall; ...(3) recommend to and facilitate the preparation of a standard reference for the names of *Diospyros SPP* and *Dalbergia SPP* to be adopted if appropriate at the 17th meeting of Conference of Parties.

iii. Importing countries especially developed countries shall....

iv. The secretariat shall (1) assist Madagascar in preparation of a stock pile audit and use plan... for presentation to the CITES Standing Committee.

11. My reading of the resolutions of the CoP 16 is that it set out an Action Plan to be undertaken by Madagascar and all concerned towards having the *Diospyros* and *Dalbergia* being listed in Appendix II of CITES during the 17th CoP. The roles of the Appellant explained and set out in Section 49 of Cap 376 and 110 of WCMA 2013, requires her to establish that there was a valid permit held by the 1st Respondent in relation to the consignment and not usurping the responsibilities of the Madagascar Government. Accordingly, my answer to the first issue is that the consignment did not form part of the endangered species at the time of seizure in May 2014.

12. The second issue is whether the 1st Respondent had the requisite valid transshipment permits. The 1st Respondent submitted she did. She annexed copies of the permits in her application dated 3rd November 2017 seeking the release of the consignment. The closest response to this application is Mr. Jackson Munyanga's affidavit dated 28th July 2018 in file no Misc. 136 of 2018. At paragraph 21, Mr. Munyanga deposed that the 1st Respondent had not challenged the analysis and findings of the report in civil suit no. 328 of 2017. At paragraph 22, he deposes that Kenya Forest Service, Kenya Wildlife Service and DCI are seeking the identity of persons behind the importation/exportation to charge them for the transportation of the rosewood consignment. At paragraph 25, that the Applicant has not provided any verified permits from CITES showing the Applicant is licensed to process, deal or traded in rosewood.

13. Mr. Munyanga or the Appellant did not however present to the trial court evidence that the permits annexed to the impugned application were not issued by a body recognised by CITES. Instead the Appellant has through the submissions before this court and the court below went into a spree of adducing evidence which is through the backdoor. For instance by submitting that on the August 2013, the CITES authorities of Madagascar requested the CITES secretariat to publish a zero quota for exports of timber Malagasy ebonies, rosewood *et al* for a period of 6 months. Where is the documentary evidence to support this? You cannot purport to oppose the grant of orders sought by submissions other than in the manner provided in civil law.

14. I am in agreement with the holdings in the decisions quoted by the Appellant in as far as they relate to the application of international law inter alia Article 2(5) of the Constitution; **Kenya Section of ICJ –versus- A.G and Another (2011) eKLR**. Except I do not find the same to

be of any assistance to the appellant's case. My answer to the 2nd and 3rd issue is that I find there was no contrary evidence provided by the appellant to contradict the 1st Respondent's documents thus the learned magistrate was within the law in making an order for the release of the seized goods to the 1st Respondent having taken into considerations the effective date of the listing of the consignment to Appendix II of CITES and or on account of availed requisite permit.

15. Who bears the costs of the Appeal? I find the appeal filed lacking in merit. I dismiss it with costs to the 1st Respondent to be borne by the Appellant.

Dated, Signed and Delivered at Mombasa this 14th day of August 2019.

A. OMOLLO

JUDGE.