**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CAUSE NO.33 OF 2019 (JR)**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE FOREST CONSERVATION AND MANAGEMENT ACT, NO.34 OF 2016**

**AND**

**IN THE MATTER OF THE FOREST (CHARCOAL) RULES, 2009**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTR OF DECISION/RULING/ORDER BY THE ELDORET PRINCIPAL MAGISTRATE'S COURT IN ELDORET CM'S MISCELLANEOUS CIVIL APPLICATIONS NO.30,46 & 80 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL MAGISTRATE'S COURT AT ELDORET.....RESPONDENT**

**AND**

**PHILEMON KEMBOI KITUM.....1ST INTERESTED PARTY**

**ELIJAH K. KIBET.....2ND INTERESTED PARTY**

**BENJAMIN CHEBOI.....3RD INTERESTED PARTY**

**AND**

**KENYA FOREST SERVICE.....EX-PARTE APPLICANT**

**RULING**

This ruling is in respect of applications dated 2nd October, 2019 and 9th October 2019 respectively by the Applicants seeking for orders of setting aside or varying the orders of stay granted by the court of 9th October 2019, and for an order allowing the applicants to transport charcoal already harvested.

Counsel for the applicant submitted that the applicant went to the CM's Court and sought orders that were granted on 14th August 2019 vide Miscellaneous. Application No. 80 of 2019 and Miscellaneous Application No. 40 of 2019.

Mr. Kiboi submitted that the order allowed the interested parties to transport charcoal purchased and harvested from private farms. Further that the IPs executed the orders by purchasing the charcoal from private farms and that they have demonstrated how they executed the orders by annexing photographs.

It was Counsel's submission that the applicant had agreements with owners of Motor Vehicles for purposes of transportation of the charcoal. Further that while the applicants were transporting the charcoal the vehicles were impounded by Kaptagat Police and the driver charged at Iten Court with the offence of ferrying charcoal without authority.

Mr. Kiboi submitted that the applicant was surprised that the Ex parte applicant had obtained an order of stay which was granted vide a Judicial Review Motion filed in court and an order for leave granted to operate as a stay. It was Counsel's submission that the applicant was not given an opportunity to state their case in the proceedings.

Counsel cited the Constitutional right to be heard and therefore urged the court to allow the applicants to transport the charcoal.

Miss Kibichy for the 1st IP submitted that the applicant was issued with orders on 6th May 2019 vide Misc. Application No 30 of 2019 and the 1st IP went ahead to execute the orders. It was her submission that the stay orders granted were done without the participation of the IP. Counsel submitted that there is a certificate of origin which is annexed to the application and that the produce is not a product of the Kenya Forest Service. That if the applicant is allowed to transport the charcoal it will not prejudice the substantive motion. Counsel therefore urged the court to allow the application as prayed.

Mr. Kuria for Respondent filed grounds of opposition and submitted that the application is incompetent as the order for review should be filed where the order was granted. That in this case the parties have elected to file a separate suit which bars the court an opportunity to avail itself the issues why the orders were issued.

That the current application is a backdoor attempt to overturn the orders vide a process not recognized by law. Counsel urged the court to dismiss the application with costs.

Mr. Mutai for the Ex parte applicant opposed the application and submitted that there are three grounds why the application should be dismissed. That no sufficient legal basis has been stated to make the court interfere with the orders that were granted. That all the applications that were granted in the subordinate courts were obtained ex parte and therefore the use of Article 50 for fair hearing does not arise. The ex parte applicant was also not given an opportunity to be heard.

That the Ex parte applicant placed before the court sufficient material to enable the court exercise its discretion in favour of the applicant.

Secondly Counsel submitted that the grant of the orders that are being sought renders restituitory procedures irrelevant Regulation 9 of the Forest charcoal Rules 2009 requires that any person who wishes to produce charcoal for commercial purposes on his own land requires to obtain a licence Counsel submitted that there is no licence that has been presented to court.

Counsel therefore submitted that the applicants have come to court with unclean hands and do not deserve the discretionary powers of the court. That Section 70 of the Forest Conservation and Management Act provides for procedures of dispute resolution which the applicants have not followed.

Mr. Mutai submitted that if this application is allowed then the JR shall have been determined prematurely.

Counsel for the applicants reiterated their submissions and urged the court to allow the applications as prayed.

**Analysis and Determination**

The applicants brought similar applications seeking for setting aside or review of the orders granted on 9th October 2019 allowing leave to operate as a stay. The issue for determination is whether the court has jurisdiction to grant the orders sought and whether the applicants deserve the exercise of judicial discretion in their favour.

This Court has jurisdiction to set aside leave and/or stay granted in Judicial Review proceedings. The Court of Appeal made this clear in **R vs. Communications Commission of Kenya & 2 Others ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it held:

> "*Leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside."*

When material placed before the court during the application for leave to file a Judicial Review is sufficient without going into the merits of the case, the Judge may grant the leave which may operate as a stay. This is what happened in this case. An aggrieved party may file an application to the judge who grated the leave to set it aside.

In the case of **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**: it was held that

> "*Although leave granted ex parte can be set aside on an application that is a very limited jurisdiction and will obviously be*

*exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."*

Even though the court has discretion to set aside the ex parte proceedings and stay, the court would sparingly do so and that the exercise of the discretion must be done judiciously.

In the case of **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003** where the court pointed out that:

"*We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."*

Having considered the issues raised before me in this matter it is my view and I hold that it is not appropriate to reverse the decision of **Ombwayo** J at this stage. The best that the parties can do is to expedite the hearing of the JR so that this matter can be determined on merits. The submission of the applicants go to the root of the JR therefore I will not deal with them at this stage.

The upshot is that the application is dismissed with costs to the Ex parte applicant.

**DATED and DELIVERED at ELDORET this 27TH DAY OF NOVEMBER, 2019.**

***M. A. ODENY***

***JUDGE***

**RULING** read in open court in the presence of Mr.Mutai for Ex-Parte Applicant, Mr.Wabwire for Respondent and Miss.Chepkemoi holding brief for Mr.Kiboi for 1st and 2nd Interested Party.

MR. Mwelem – Court Assistant