



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC NO.39 OF 2017**

**RAYCON LIMITED .....PLAINTIFF**

**VERSUS**

**SUPERPLY LIMITED.....1<sup>ST</sup> DEFENDANT**

**AWEN SAW MILLS LIMITED.....DEFENDANT**

**DIRECTOR KENYA FOREST SERVICES.....3<sup>RD</sup> DEFENDANT**

**RULING**

***( Application for injunction; plaintiff alleging to have been allocated rights to harvest part of the Mau Forest; claim that 1<sup>st</sup> and 2<sup>nd</sup> respondents have now proceeded to harvest this portion; no valid licence displayed by plaintiff; no proof that plaintiff has abided by the terms of allocation; 1<sup>st</sup> and 2<sup>nd</sup> respondents not denying harvesting the portion under dispute alleging an exchange; no right to harvest displayed by 1<sup>st</sup> and 2<sup>nd</sup> respondents; 1<sup>st</sup> and 2<sup>nd</sup> respondents stopped from harvesting this portion; Director, Kenya Forest Service, directed to produce harvest records; facts revealing mismanagement of forests; Criminal Investigating Department and EACC directed to investigate).***

1. This suit was commenced by way of plaint filed on 9 February 2017. In the plaint, the plaintiff, a limited liability company, has pleaded that it on 13 August 2014, received a letter from the Director of Kenya Forest Service, the 3rd defendant, that it has been prequalified as a sawmiller. The prequalification was for purposes of harvesting exotic timber and transmission poles in forests managed by the Kenya Forest Service (KFS). It is averred that pursuant to the allocations by KFS, the plaintiff has undertaken several harvest in Baringo County. It is pleaded that on 2 March 2015, the plaintiff was granted authority to harvest over mature materials being 1027 trees in a site described as Narasha 6(A) and was granted a general forest licence No. 000203 issued on 22 October 2015 for the year 2015 and that this is payable annually.

2. It is pleaded that on 5 April 2016, the plaintiff was granted authority to harvest 612 trees in Arama 3(F), Portion 2 within the Mau Conservancy. The plaintiff was to pay the Appropriation in Aid amounting to Kshs.2,846,202 and have a licence before it could harvest the trees. It is pleaded that the 1st and 2nd defendants were at the same time given authority to harvest 612 trees in Portions 3 and 4, in Arama 3 (F). It is said that all trees that were to be harvested were marked and stamped for identification. It is pleaded that the plaintiff's director and the director of the 1st and 2nd defendant had a business relationship and were trading together but had a fall out in November 2016.

3. It is averred that on 7 February 2017, the plaintiff's director, one Patrick Bundotich, discovered that the 1st and 2nd defendants had entered into Arama 3(F) Portion 2, and proceeded to harvest trees. It is pleaded that following this, the plaintiff will lose Kshs. 2,040,000/= and payment of Appropriation in Aid of Kshs. 2, 846,202.80 totaling a loss of Kshs. 4, 886,202/=. It is alleged that the defendants colluded to defraud the plaintiff and that the 3rd defendant owed the plaintiff a duty of care not to adversely compromise its interests. It is further contended that the 1st and 2nd defendants were negligent in failing to make inquiries so as to ascertain who held good title to the forest produce.

4. In this suit, the plaintiff has sought the following orders :-

*(a) A declaration that the 3rd defendant's actions of failing to adhere to the provisions of the allocation letter dated 5 April 2016 amounts to breach of contract.*

*(b) A declaration that the harvest of forest produce in Arama 3(F) Portion 3(F) by the 1st and 2nd defendants is illegal.*

*(c) This Honourable Court do order the 3rd respondent to reallocate Arama 3(F) Portion 4 to the plaintiff herein.*

*(d) As against all the defendants jointly and severally, costs of this suit and interest thereon.*

*(e) Any such further or other relief as this Honourable Court may deem fit to grant.*

4. Together with the plaint, the plaintiff filed an application for injunction which was later amended. It is that application for injunction which is the subject of this ruling. The prayers sought are as follows :-

*(i) spent...*

*(ii) That a temporary injunction does issue restraining the 1st, 2nd and 3rd respondents or any person purporting to act on their behalf or their offices, their servants, workmen, licencees, agents from howsoever harvesting and processing produce from Arama 3F Portions 2,3 and 4 located in Baringo County, Mau Conservancy, pending hearing and determination of this suit.*

*(iii) That a temporary injunction does issue restraining the 1st and 2nd respondents or any person purporting to act on their behalf or their offices, their servants, workmen, licencees, agents from howsoever disposing off, selling and removing harvested produce from Arama 3F portions 2, 3, and 4 located in Baringo County, Mau Conservancy in their sawmill located in Eldama Ravine pending the hearing and determination of this suit.*

*(iv) That the 1st, 2nd and 3rd respondents be ordered to produce the harvest records of Arama 3F Portions 2, 3 and 4 located in Baringo County, Mau Conservancy, pending hearing and determination of this suit.*

5. The application is based on grounds inter alia, that the plaintiff was allocated rights to harvest timber in Arama 3F Portion 2; that the 1st and 2nd respondents harvested timber from this portion; that the plaintiff's allocation letter has never been cancelled; that the 1st and 2nd defendants have not paid Appropriation in Aid for this portion; that the 1st and 2nd defendants will solely benefit without reimbursing the applicant or the 3rd respondent for the Appropriation of Aid fee; that the 1st and 2nd defendants share a common director and share a sawmill and it is difficult to ascertain which party harvested the trees and took them to the sawmill for processing; that it is prudent to injunct both 1st and 2nd defendants from harvesting and selling the harvested trees; that the 1st and 2nd respondents have harvested Portions 2 and 3 almost to completion and if they are allowed to harvest Portion 4, the applicant will be left with no portion to harvest; that the applicant is facing a loss of Kshs. 4, 886,202/=:; that the applicant stands to suffer irreparable loss; that the applicant is apprehensive that the respondent is in the process of disposing the produce obtained in Arama 3F Portions 2 and 3.

6. The application is supported by the affidavit of Patrick Bundotich the director of the plaintiff company. He has deposed inter alia that on 13 August 2014, his company received a letter from the 3rd respondent that the company has been prequalified as a sawmiller; that he was granted a General Forest Licence No. 000203 that was payable annually which was issued on 22 October 2015; that on 5 April 2016, he was granted authority to harvest 612 trees from Arama 3 (F) Portion 2; that it was a requirement that he holds a licence and pay Appropriation in Aid amounting to Kshs. 2, 846,202/=; that the 1st and 2nd respondents were granted authority to harvest 612 trees from Portions 3 and 4 respectively in Arama 3 (F); that in November 2016 he had a fallout with the common director of the 1st and 2nd respondents and he established his own sawmill and stopped using his sawmill; that he has been unable to harvest the trees allocated as he is required to pay the Appropriation in Aid amounting to Kshs. 2,846,202/=; that on 7 February 2017, he discovered that the 1st and 2nd respondents had entered Arama 3(F) Portion 2 and proceeded to harvest trees; that he inquired from the Eldama Ravine Forest Conservator; that the Conservator informed him to talk to Hon Musa Sirma (the director of the 1st and 2nd respondents) so that he can be reallocated Portion 4 which had not yet been harvested; that he was not agreeable owing to the fall out that they had; that the 3rd respondent has failed to stop the 1st and 2nd respondents because the director is an influential man in the society and they fear antagonizing him; that from the 3rd respondent's previous practice, he is aware that there is need to cancel an allocation to an individual; that despite expiry of the stipulated period, without cancellation of the allocation, he is entitled to pay the Appropriation in Aid fee and continue harvesting trees in the allocated portion; that he has discovered that neither the 1st and 2nd respondents have paid the requisite fees for Portion 2 and the 3rd respondent has not cancelled the allocation issued to him; that the 3rd respondent should produce the records of the trees harvested in Arama 3(F) Portions 2, 3 and 4; that if Portion 4 is harvested, he will have no portion to harvest.

7. The 3rd defendant (The Director, KFS) has filed nothing to respond to the motion and indeed has not even entered appearance despite being served with summons and the application. The 1st and 2nd defendants have however opposed the motion through the Replying Affidavit of Hon. Musa Sirma, a director of the two companies. It is deposed that the plaintiff felled the respondents' stems under Portion 7G Portion 1 to a tune of 1531 stems and he is thus stopped from rescinding what Mr. Sirma terms to be a meager claim of 612 stems under Portion 3F (2) which he is legally not entitled to. He has deposed that the licence issued to the plaintiff company is both expired and illegal hence unenforceable; that the applicant has no valid licence; that the licence to harvest Arama 3 (F) Portion 2 had a harvesting time frame; that the plaintiff (probably meaning Mr. Bundotich) is employed as a general manager by the 1st and 2nd respondents; that it is inept to make references to the licences issued under Arama (F) 3 and 4 which are not under contest; that the alleged fall out is a lame duck excuse; that there existed a mutual understanding between the parties on swapping of the portions.

8. The plaintiff filed an affidavit refuting that they have a mutual agreement by which it agreed to allow the 1st and 2nd respondents to harvest in Arama 3F Portion 2. It is reiterated that the 1st and 2nd respondents are harvesting trees without proper allocation. Mr. Bundotich has stated that the only agreement he had with the 1st and 2nd respondents was in relation to trees harvested in Narasha 7G Portion 1 where he harvested 1131 trees out of a total of 1531 trees and that he paid for the same. In exchange, the 1st and 2nd respondents would harvest the trees in Narasha 6(A) Portion 6 which had 1027 trees. He has refuted being an employee of the 1st and 2nd respondents.

9. I have considered the application alongside the submissions of Ms. Wachira for the applicant and Mr. Biko for the 1st and 2nd respondents.

10. Mr. Biko raised a few preliminary points which I wish first to address, albeit briefly, for I have not seen much substance in them. First, it was contended that this court has no jurisdiction as the matter in issue is commercial in nature. I see no place in this argument. This matter herein concerns the harvesting of trees in a forest conservancy, and I see no better place to have it determined, other than in the Environment and Land Court. It is a matter squarely touching on the sustainable exploitation of forests which is an issue of environmental conservation. In short, this court has jurisdiction to try this case. Indeed the Forest Management and Conservation Act, 2016 does recognize the jurisdiction of the Environment and Land Court in matters reflected in that statute.

11. The other objection was to the veracity of the suit. It was said that no resolution of the company was annexed. I see no issue in this. The plaintiff company has come to court and no one from the company has refuted that the company has not properly come to court. It is not disputed that Mr. Bundotich is a director of the plaintiff company and generally, directors do have authority to file suits on behalf of their companies.

12. It was also alleged that no summons have been served. I wonder why this issue is being raised. The essence of summons is to inform the other party that there is a suit filed. Once the other party is aware of the suit and has entered appearance, what's the point of arguing that summons have not been served ?

13. There is really no much substance in these technical objections. Let me now get to the substance of the matter.

14. The applicant seeks an injunction to stop the respondents from harvesting forest produce from Arama 3(F) Portion 2, 3 and 4. The applicant also wants the 1st and 2nd respondents restrained from selling or removing harvested produce from Arama 3(F) Portions 2, 3 and 4 in their sawmill. It also wants the 3rd respondent to produce the harvest records in respect of Arama 3(F) Portions 2, 3 and 4.

15. The case of the plaintiff is that it has a licence to harvest timber and was authorized through a letter dated 5 April 2016 to harvest 612 trees in Arama 3 (F) Portion 2 (for ease of reference, I will henceforth refer to it as Arama 3F2 and the other portions as Arama 3F3 and Arama 3F4). The 1st and 2nd respondents of course refute that the plaintiff has a licence.

16. In his supporting affidavit, Mr. Bundotich has annexed documents to demonstrate that the plaintiff company has a licence. I have gone through these documents. I have seen a letter dated 13 August 2014 from the 3rd respondent, stating that the plaintiff is prequalified as a sawmiller for Baringo County. I have seen that on 2 March 2015, the plaintiff was allocated the rights to harvest 1027 trees in Narasha 6(A) 6. The terms for that allocation required the plaintiff to harvest the trees within 30 days and pay Appropriations in Aid of Kshs. 2,522,851.30/= in full before harvesting can commence. This particular contract may not be much in issue, but it is very telling on the manner in which the 3rd respondent has managed forests, a natural heritage entrusted to him by Kenyans. The plaintiff has averred that these trees were harvested, but from the receipts annexed, payments for Appropriations in Aid were made on 15 February 2016, 29 February 2016, and 29 March 2016, more than a year after the allocation. Your guess is as good as mine on what happened to the 30 days requirement for payment of Appropriations in Aid. I will come back to this later, for I will need to make certain orders arising from what I have seen, but let me get back to the issue at hand, which is Arama 3F.

17. I have of course stated that the plaintiff has averred that it has a licence and was allocated Arama 3F2 to harvest through the letter of 5 April 2016. I have looked at the licence annexed by the plaintiff. It is dated 22 October 2015 which is the same date that a fee of Kshs. 30,000/= was made for the licence. The licence as issued was backdated to 1st January 2015 for reasons that I am unable to tell, and was to expire on 31 December 2015. I want to move on, but I just find it difficult not to go back to the licence over Narasha 6A6. How did the plaintiff manage to get a licence to harvest Narasha 6A6 on 2 March 2015 when it paid for its licence on 22 October 2015 ? Something fishy is surely smelling here !

18. Be as it may, I have not seen any licence for the year 2016 or 2017 displayed by the plaintiff. In short, the plaintiff company had no business being given allocations in the year 2016 to harvest timber by the 3rd respondent. It ought not have been privileged by the letter dated 5 April 2016 at all. Again, just as I was at a loss as to how the plaintiff managed to get an allocation for Narasha 6A 6, I am also at a complete loss as to how it convinced the 3rd respondent to issue it with an allocation for Arama 3F2 on 5 April 2016 when it had no licence.

19. Leaving alone that the plaintiff has not shown any valid licence, the letter of 5 April 2016 provided that harvesting of timber was to be done within 30 days and only after payment of Appropriations in Aid of Kshs. 2, 846,202.80/=. It is apparent that by February 2017, when the events herein are said to have occurred, the plaintiff had not harvested the timber within the 30 days stated in the letter. Neither has the

plaintiff demonstrated that it had paid the sum of Kshs. 2, 846, 202.80/= as Appropriations in Aid.

20. Having not displayed any licence, and not having paid the required sum of money, I wonder on what basis the plaintiff can claim to have any sort of right to harvest timber in Arama or indeed in any forest in Kenya. He cannot therefore have the benefit of any order from this court. In fact, the plaintiff has clearly and continuously been in violation of Section 64 (1) (a) of the Forest Management and Conservation Act, 2016 which provides as follows :-

*64. (1) Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest –*

*(a) fell, cut, take, burn, injure or remove any forest produce.*

21. That said, I cannot close my eyes to the fact that the 1st and 2nd respondents have also not displayed to this court that they were granted any licence to harvest produce from Arama 3F2. I in fact got disturbed by the revelations made by Hon. Musa Sirma in his replying affidavit. He stated that his company proceeded to harvest Arama 3F2 because the plaintiff company had earlier harvested what was allocated to the 1st and 2nd respondents in area 7G1. The 1st and 2nd respondents essentially admit to having proceeded to mow down a part of a forest without having any licence to do so. How that happened right under the nose of the 3rd respondent and its officers is extremely revolting.

22. I have already set out Section 64 (1) (a) of The Forest Conservation and Management Act, 2016 which makes it mandatory for one to have a licence before harvesting any trees in a forest. Section 64 (2) provides that it is an offence for any one to undertake those activities without a licence. Right before me, the 1st and 2nd respondents are essentially admitting to have committed an offence !

23. I am appalled by the banditry that has been displayed to me in the course of hearing this application. It does appear, from what I have before me, that the 3rd respondent and its officers have outrightly failed in their mandate to manage the forests that Kenyans have entrusted to them. They have allowed the forests to be overrun by what appears to me to be a cartel, right before their own eyes.

24. I have a responsibility, as a Judge of the Environment and Land Court, to ensure that the law is followed when dealing with a matter that touches on a matter so critical as the conservation and management of a forest. The importance of managing forests cannot be underscored and I am not going to sit back while persons destroy our heritage with impunity without following the law. Thus, in as much as I do not think the plaintiff has displayed any rights, I must allow prayer 4 of the application with modifications, and I do order the 1st and 2nd respondents, before proceeding to harvest any timber in any portion of Arama 3F2, to produce its licence and letter allocating this area of the forest to it for harvesting. I cannot allow the 1st and 2nd respondents to harvest trees in a forest where I have doubts as to whether they have a licence to do so and in the same vein I cannot allow them to remove any timber harvested from this area without being shown proof that they have a right over this part of the forest. The 1st and 2nd respondents are therefore barred from removing any harvested timber in respect of Arama 3F 2 unless and until they display the licence and rights to harvest as I have indicated above, or until the hearing and conclusion of this suit.

25. The 3rd respondent must also produce evidence of who harvested Arama 3F2, 3 and 4, whether such person had a licence and right to harvest, and whether such person paid the necessary Appropriations in Aid. The 3rd respondent must also produce the harvest records for Arama 3F, Portions 2, 3 and 4 in issue in this case. This must be done within 21 days of service of this order which I direct the Deputy Registrar to extract and ensure that a CourtProcess Server serves it upon the Director of Kenya Forest Service, the 3rd respondent.

26. I also direct that this ruling be served upon the Director of the Ethics and Anticorruption Commission, and the Director of CID, so that they may investigate whether any crime has been committed, by the activities that have been revealed in this matter.

27. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of March 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In the presence of :-**

Ms.Wachira for the plaintiff/applicant

Mr .Biko for the 1st and 2<sup>nd</sup> defendants/respondents

No appearance for 3<sup>rd</sup> defendant/respondent

Court Assistant :Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**