



**Kenya Tea Development Agency Holdings Limited & 2 others v Attorney General;
East African Tea Trade Association (Interested Party) (Miscellaneous Criminal
Application E133 of 2021) [2022] KEHC 13257 (KLR) (Crim) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 13257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E133 OF 2021
CW GITHUA, J
JULY 27, 2022**

BETWEEN

**KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED 1ST
APPLICANT**

KTDA MANAGEMENT SERVICES LIMITED 2ND APPLICANT

CHAI TRADING COMPANY LIMITED 3RD APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

AND

EAST AFRICAN TEA TRADE ASSOCIATION INTERESTED PARTY

RULING

1. The 1st applicant according to the material placed before this court is a public limited company registered under the [Companies Act](#) chapter 486 laws of Kenya (now repealed) and is a holding company which owns several subsidiary companies including the 2nd and the 3rd applicants.
2. The three applicants moved this court through a notice of motion dated April 19, 2021 in which they challenged and sought revision of the *ex parte* orders issued by the lower court in Milimani Chief Magistrate's Court Miscellaneous Criminal Application No E1248 of 2021. The orders were issued pursuant to an application filed by the respondent dated April 15, 2021.
3. In the impugned *ex parte* orders, the lower court issued a search warrant authorizing officers working under the respondent to, inter alia, access the premises of the three applicants and the interested party



for the purpose of obtaining evidence related to the commission of suspected crimes including abuse of office, money laundering and other economic crimes.

4. While the applicants challenged the impugned orders by invoking this court's revisional jurisdiction under section 362 as read with section 364 of the *Criminal Procedure Code*, the interested party chose to contest the orders by filing an application for judicial review in Judicial Review Application No E063 of 2021.
5. Upon being served with the applicants' revision application, the respondent filed several pleadings in response thereof including a notice of motion dated June 8, 2021 seeking that the application be consolidated and heard together with the interested party's JR Misc Application No E063 of 2021. It is this notice of motion that is the subject of this ruling.
6. In the grounds premising the motion and in the depositions made by the deputy chief state counsel Mr Nguyo Wachira in the supporting affidavit dated June 8, 2021, the respondent contends that since the applicants' application and the judicial review application stem from the same subject matter and seek similar orders, they should be heard together because if they are heard separately by two different judges, conflicting decisions may be issued which would confuse jurisprudence on the same issue.
7. The application is opposed by the applicants vide a replying affidavit sworn on their behalf on February 21, 2022 by Dr John Kennedy Omanga, the 1st and 3rd applicant's group company secretary. In the main, the applicants oppose the motion on grounds that though both applications are based on the same factual background caused by the respondent, the two matters cannot be consolidated because the applicant's case questions both the procedure and merit of the impugned orders while the judicial review application is limited to contesting the procedure through which the orders were granted. It is the applicant's case that their revision application cannot be subsumed into the interested party's case since their case is wider in scope and goes beyond the jurisdiction of a judicial review court.
8. The interested party though indicating through its learned counsel Mr Njenga that it intended to contest the application failed to file any response or submissions in support or in opposition to the application.
9. At the hearing, learned counsel for the applicants Mr Kivindy and learned counsel for the respondent Mr Wachira chose to entirely rely on their written submissions in prosecuting the application. In their submissions, both learned counsel reiterated and expounded on the positions taken by their respective clients in support and in opposition to the respondent's application.
10. In addition, the respondent relied on the case of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa*, [2000] eKLR among other cases which set out principles courts consider in determining applications for consolidation of suits. Mr Wachira contended that as the two applications seek similar reliefs and they are yet to proceed for hearing, consolidation of the same would facilitate their efficient and expeditious disposal and will be in the interest of justice; that in any event, if the application was allowed, neither of the parties would suffer any damage, loss or prejudice.
11. On their part, the applicants, besides relying on the authorities cited by the respondent which speak to the principles guiding consolidation of suits and the objective of consolidation maintained that it is the interested party's case that ought to be heard within their application for revision as in hearing the application, the court will be exercising its supervisory jurisdiction and will be in a position to conclusively determine all the parties grievances concerning both the procedure used to obtain the impugned orders as well as their merits which it would not be mandated to do when exercising its judicial review jurisdiction



12. I have carefully considered the application and the rival written submissions made by the parties in support and in opposition thereto. I have also called for and perused the court record in Judicial Review Application No E063 of 2021. Having done so, I find that the only issue that arises for my determination is whether the two applications ought to be consolidated for hearing as prayed by the respondent.
13. To start with, I wish to state at the outset that it is not disputed that the two applications emanate from the same factual basis. However, my perusal of the court record in Judicial Review Application No E063 of 2021 reveals that what is pending determination by the court is the interested party's application for leave to institute judicial review proceedings against the respondent herein and the Chief Magistrate's Court Nairobi for orders inter alia, of certiorari to quash the impugned ex parte orders and orders of mandamus to compel the respondent through its appointed inspectors to return and retribute to the interested party all items, equipment and documents confiscated from its premises pursuant to the aforesaid ex parte orders.
14. It is clear from a perusal of the judicial review application that it is anchored on sections 8 and 9 of the *Law Reform Act* and order 53 of the *Civil Procedure Rules* (CPR). Order 53 of the CPR was promulgated pursuant to the rules made under section 9 (1) of the *Law Reform Act* specifically to govern the conduct of judicial review proceedings. Order 53 rule 1 states as follows:

“(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3)

(4)

Order 53 rule 3 (1) proceeds to provide as follows:

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”

15. Order 53 rule 3 (1) makes it clear that it is only upon grant of leave that a party can file a substantive motion for judicial review seeking grant of judicial review remedies in respect of which leave had been granted. The grant of leave is dependent on the exercise of the court's discretion and is a pre-requisite to the filing of the notice of motion for judicial review. An application for leave is basically the first step towards instituting judicial review proceedings.

It is a tool used by the court to filter frivolous or unnecessary applications for judicial review so that leave is granted only when the court is satisfied that the intended application raises real legal issues and the applicant has an arguable case.

16. As stated earlier, the grant or refusal of leave involves the exercise of the court's discretion and it is therefore not possible to determine the outcome of an application for leave to institute judicial review proceedings. Since leave is yet to be granted to the interested party in Judicial Review Miscellaneous



Application No E063 of 2021, it is obvious that no application for judicial review has been filed therein. In the circumstances, the respondent cannot validly claim that there is an application for judicial review pending determination in that case. See: Republic v Communications Commission of Kenya ex Parte East Africa Television Network Limited [2001] eKLR.

17. In view of the foregoing, it is clear to me that there is no application for judicial review pending determination in Judicial Review Miscellaneous Application No E063 of 2021 which is capable of being consolidated with the application for revision filed by the applicants. Consequently, I have come to the inevitable conclusion that the respondent's application dated June 8, 2021 is premature and devoid of any merit. The same is accordingly dismissed.
18. In order to expedite disposal of the main dispute between the parties in this matter and in obedience to the constitutional dictate in article 159 (1) (b) that justice shall not be delayed, I hereby direct the parties to take directions on the hearing of the applicant's revision application dated April 19, 2021 soon after delivery of this ruling.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2022.

C. W. GITHUA

JUDGE

In the presence of:

Mr Kivindyo for the applicants/respondents

No appearance for the respondent/applicant

No appearance for the interested party

Ms Karwitha: Court Assistant

