



Muhamed v Pest Control Products Board & another (Miscellaneous Application E073 of 2020) [2022] KEHC 18066 (KLR) (Judicial Review) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 18066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW**

MISCELLANEOUS APPLICATION E073 OF 2020

J NGAAH, J

JULY 22, 2022

BETWEEN

AHMED RASHID MUHAMED APPLICANT

AND

PEST CONTROL PRODUCTS BOARD 1ST RESPONDENT

WAWANG (KENYA) TRADE COMPANY LTD 2ND RESPONDENT

RULING

1. Before this Honourable Court is the applicant's Notice of Motion dated 10 December 2020. It is filed under order 53 Rule 1 and 2 of the [Civil Procedure Rules](#) and sections 8 & 9 of the [Law Reform Act](#), cap. 26. It seeks leave to apply for the orders of *certiorari* and prohibition, amongst other prayers.
2. The prayers for the two orders have been framed as follows:
 1. ...
 2. That this Honourable Court be pleased to grant the applicant leave to institute judicial review proceedings against the intended respondents by way of orders of *mandamus*, *certiorari* and prohibition.
 3. That leave, once granted, it should be leave to apply for orders:
 - i. Of *certiorari* to bring before this Honourable Court and quash the decision of the chief executive/secretary (hereinafter referred to as the 1st respondent to release the mosquito coil consignment to the 2nd respondent.



- ii. Of prohibition to prohibit the 1st respondent by herself, her servants, agents and/or other officers, from releasing the consignment to the 2nd respondent.
 - iii. to prohibit the intended 1st and 2nd respondent by itself, its servants, agents and other officers, or its lead ministries, from purporting to or from interfering with the lawful right of the applicant to the consignment.”
- 3. The application is said to be based on “the grounds set out in the statement annexed hereto” and the Affidavit sworn by the applicant.
- 4. I have not been able to find the statutory statement either in the physical court file or on the e-portal. All I have seen is the motion and the affidavit in support of the motion.
- 5. In this affidavit, the applicant has described himself as being “the duly representative of all that consignment impounded by the 1st respondent”. He goes further to say that he is the duly appointed representative of the 2nd respondent.
- 6. He has deposed that the 1st respondent has purported to release some consignment to the 2nd respondent without any reference to the applicant despite the fact that he is the 2nd respondent’s representative.
- 7. The application has been opposed by the respondents and to that end, they have filed their respective replying affidavits.
- 8. Dr Esther Kimani swore the replying affidavit on behalf of the 1st respondent. She has deposed that the 1st respondent is a statutory body with the mandate to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests and of the organic function of plants and animals and for connected purposes.
- 9. It is her case that according to Regulation 4 (2) of the [Pest Control Products \(Registration\), Regulations, 1984](#), an applicant who is not resident in Kenya has to appoint an agent permanently resident in Kenya to whom any notice or correspondence may be sent. Wawang (Fujian) Daily Chemicals Co. Ltd, a company registered in China appointed the 2nd respondent as its local agent, pursuant to this provision of the law. However, before the 2nd respondent was registered and issued with the necessary licence, it was found in possession of imported unregistered pest control products made up mosquito coils contrary to section 4 (1) of the [Pest Control Products Act](#). These mosquito coils were impounded and the 2nd respondent’s director, Wang Limin, charged in Makadara Law Courts Criminal Case No 4888 of 2019. He was convicted and fined Kshs 100,000/=.
- 10. Upon conviction, the court directed that the unregistered mosquito coils be released to the 1st respondent. The latter was to release the consignment to the 2nd respondent upon compliance with the law on registration or, in the alternative, the impounded consignment was to be re-shipped back to its country of origin at the expense of the 2nd respondent.
- 11. The 2nd respondent successfully complied with the registration of the product as directed by the court and was issued with a notification of temporary registration for the mosquito coils. Following the compliance with the law, the 2nd respondent was invited to collect the mosquito coils by the 1st respondent’s letter dated 12 November 2022. The consignment was collected on 13 November 2020.



12. It was also deposed that, having been appointed as the representative of the parent company in China, the 2nd respondent has no legal capacity to appoint any other agent and therefore the applicant's argument that it is a representative of the 2nd respondent has no basis in law.
13. In releasing the consignment to the 2nd respondent, the 1st respondent thereby complied with the order of the court made in Criminal Case No 4888 of 2019.
14. In his affidavit, Wawang Limin, one of the directors of the 2nd respondent states that the applicant and the 2nd respondent have a business relationship. In 2019 a commercial dispute arose between them but they reached an amicable settlement which was eventually captured in an agreement dated 26 August 2019.
15. On 6 September 2019, the 2nd respondent's consignment of mosquito coils was impounded by the 1st respondent's officers on the allegations of importing the coils without a licence. He was charged in Makadara Law Courts Criminal Case No 4888 of 2019. On 3 October 2019 the court ordered that the consignment could be returned to the 2nd respondent if it complied with the necessary registration requirements and obtained the requisite licence.
16. On 25 August 2020, the 1st respondent issued the 2nd respondent with a temporary licence and subsequently the consignment of mosquito coils was released to the 2nd respondent. Since then, the applicant has been writing to the 2nd respondent demanding remuneration for services rendered in acquisition of the temporary licence.
17. The deponent has in any event denied that the applicant is the 2nd respondent's representative.
18. At this stage of the proceedings, the court will ordinarily not go into the merits of what would be the applicant's suit if leave was granted. All that the court is interested in at the moment is whether the applicant has made out an arguable case capable of yielding the judicial review orders sought.
19. In order to guard against delving into the merits of the case, Lord Diplock, IRC V National Federation of Self-Employed and Small Businesses Ltd (supra) suggested the following approach.

"If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."
20. Thus, on this basis, the applicant only has to show not that it is, but that it might turn out to be, an arguable case.
21. The question is whether the applicant has made out such a case. I am persuaded that he has not. I say so because what comes out clearly in his affidavit in support of the application is a dispute over what he considers his remuneration due to him from the 2nd respondent. It is his case that he should be paid before the consignment of goods is released the 2nd respondent. This is clear from one of the exhibits attached to his affidavit being a letter dated 4 November 2020 addressed to the first respondent's chief executive officer by the applicant's counsel. Due to its centrality to the issue at hand, I reproduce pertinent parts of the letter here:

"RE: Temporary Registration For Mosquito Coils and Release of Impounded Mosquito Consignment

We refer to the above matter.



We have been instructed and retained by Ahmed Bashir Mohamed (hereinafter referred to as our “client”) to address you as here under.

Our client is an agent of Wawang (Kenya) Trade Co. Ltd who has been following up with your good offices on the registration of Wawang Mosquito Coils. Our client has been in constant communication with your good offices since the said mosquito coils were impounded by your officers.

Our client informs us that a temporary registration of Wawang Mosquito Coil has been granted by the board and the impounded goods are due for release to Wawang (Kenya) Trade Co.Ltd.

There is however a dispute between Wawang (Kenya) Trade Co.Ltd and our client on his remuneration for services offered to Wawang (Kenya) Trade Co.Ltd in pursuance of the registration of Wawang Mosquito coils with the board. The efforts of our clients to resolve the dispute amicably has been hindered by the unresponsive nature of Mr. Billy, a director of Wawang (Kenya) Trade Co.Ltd.

our client is apprehensive that in case the goods are released to Wawang (Kenya) Trade Co.Ltd. before the dispute is resolved, he stands to suffer substantial economic loss and damage.

We therefore request your good office to hold the process of release of the said goods to enable our clients to amicably resolve the dispute so as to avoid dragging the board into unnecessary litigation.

Should you require any further information and clarification, do not hesitate to contact the undersigned.

Yours faithfully,

S.O. Owino & Associates.”

22. It is clear from this letter that if there is any dispute, it is a dispute between the applicant and the 2nd respondent. In other words, it is a dispute between two private individuals whose resolution does not require the intervention of a judicial review court. If the applicant has any claim against the 2nd respondent, it is as a claim that can and should be resolved by way of an ordinary civil suit and not in judicial review proceedings.
23. In releasing the consignment of mosquito coils in issue, it is obvious that the 1st respondent was complying with an order given by a court of competent jurisdiction. That order has not been challenged anywhere or, rather, there is no evidence that the order is subject to any form of challenge. A decision to comply with a court order cannot be quashed.
24. And in compliance with that order, the evidence that the consignment of mosquito coils has been released to the 2nd respondent has also not been controverted. It follows that an order of prohibition purporting to restrain or to prohibit the 1st respondent from releasing the consignment to the 2nd respondent is not viable because it has been overtaken by events.
25. I have also noted that the application is not accompanied by a statutory statement. There is none on the court record and neither is there any on the portal.



26. In the absence of the statutory statement the application before me would be incomplete. Under Order 53 Rule 1(1) and (2) it is mandatory that the application for leave must be accompanied by a statutory statement. That rule reads as follows:
- (1) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefore 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.
27. Under Order 53 Rule 4(1) of the *Civil Procedure Rules*, copies of the statement must be served together with the substantive motion. One of the reasons why the statement is necessary is because it would contain the grounds upon which relief is sought. Without the statement there would be no entry point through which a judicial review court can intervene and interrogate the administrative action complained of.
28. For the avoidance of doubt, Order 53 Rule 4 is clear that no ground shall be relied upon except that specified in the statement. It reads as follows:
- (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.
29. It follows that an applicant cannot dispense with the statement for without it the application would be incomplete and, strictly speaking, there would be no, or no proper application before court.
30. For these two reasons, I am inclined to conclude that the purported application before court is incompetent, defective and an abuse of the process of this Honourable Court.
31. It is hereby dismissed with costs to the respondents. It is so ordered.

SIGNED, DATED AND DELIVERED ON 22 JULY 2022

NGAAH JAIRUS

JUDGE

