



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

JUDICIAL REVIEW APPLICATION NO. 1 OF 2020

IN THE MATTER OF: IN THE MATTER OF AN APPLICATION BY STAR BRILLIANT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS, PROHIBITION AND DECLARATION

and

IN THE MATTER OF IN THE MATTER OF THE MEAT CONTROL ACT, CAP 356

AND

IN THE MATTER OF: IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: IN THE MATTER OF STATUTORY INSTRUMENTS ACT, 2013

AND

IN THE MATTER OF: IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 53

BETWEEN

STAR BRILLINAT LIMITED.....APPLICANT

AND

THE CABINET SECRETARY - MINISTRY OF AGRICULTURE,

LIVESTOCK, FISHERIES AND CO-OPERATIVES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Background

1. On 28th April 2020, the applicant filed a Certificate of Urgency and Chamber Summons of even date seeking the following substantive orders:

“a) An Order of Certiorari removing to this Honourable Court to be quashed the Legal Notice Number 63 of 2020 issued by the 1st Respondent.

b) An Order of Prohibition prohibiting the 1st Respondent, his officers and agent from issue and implementing Legal Notice

Number 63 of 2020 pending the hearing and final determination of the Application.

c) *An Order of Declaration that the Legal Notice 63 of 2020 violates the rights of the Applicant under Article 47 of the Constitution, Sections 5 and 6 of the Fair Administrative Action Act, No. 4 of 2015 and provisions of the Statutory Instruments Act, 2013.*”

2. The aforementioned Legal Notice No. 63 of 2020 was exhibited as annexure “SB4” by the applicant and reads:

“Revocation of Declaration

In exercise of the powers conferred by Regulation 3 (1) of the Meat Control Act (Export Slaughter house) Regulations, the Cabinet Secretary for Agriculture Livestock and Fisheries and Co-operatives revokes the declaration of the following slaughter houses as export houses for the purpose of these regulations with effect from March 2020.

Star Brilliant (EPZ) Limited

Goldox (K) Limited

Silzha Limited

Fuhai Machakos Trading Company Limited

Dated the 31st March, 2020

Peter Munya

***Cabinet Secretary.*”**

3. The Court certified the application as urgent given the nature of the notice and the alleged infringement of the rights of the Applicant.

4. After certifying urgency and the parties appearing before the court on several mentions, stay was issued of the Cabinet Secretary’s revocation of the licences of the applicant pursuant to Legal Notice No. 63 of 2020. It then emerged that there are two petitions or judicial review applications filed in Nairobi challenging the same Legal Notice No. 63 of 2020. The suits are:

Nairobi Petition No. 85 of 2020 Davis Njunga Kamau, Star Brilliant Limited & Silzha Limited v The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives and The Attorney General Nairobi Petition No. 105 of 2020 Goldox (K) Limited v The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives and The Attorney General

5. In the interim period, on 13th July 2020 and before the Attorney General on behalf of the Respondents filed any responses to the Judicial Review Application, one Robert Maitethya, purportedly suing on behalf of the Donkey Welfare Community Based Organization, filed an application to be enjoined in the suit as an Interested Party. The application is the subject of this Ruling.

6. At the mention on 30th July, 2020 the court was informed by counsel for the Interested Party about further details of the other on-going suits in the Milimani Constitutional and Judicial Review Division of the High Court. These are Petition No. 85 of 2020 and Petition No. 105 of 2020. After an exchange between the parties on the above, and the fact that some of the documents relating to those suits were unclear, the Court directed the Interested Part to “*re-file their application with full information to enable the court to arrive at a just decision on the same and the subject matter herein*”.

7. To move the matter forward all parties were directed to file submissions on the Interested Party’s application.

Analysis and determination on the issue of other pending suits.

8. Amongst the documents filed by the Interested Party were the following:

a) In respect of **Petition No. 85 of 2020**, Milimani, the suit being between **Davis Njunga Kamau, Star Brilliant Limited and Silzha Limited v The Cabinet Secretary Ministry of Agriculture and The Attorney General**.

Included in the documents for Petition No. 85 is a Notice of Motion date stamped at the Constitutional and Human Rights Division, Nairobi, on 3rd March, 2020.

In a supplementary Affidavit by one John Ngonyo Kariuki filed on 28th April, 2020 at paragraph 8 the deponent avers the alleged unconstitutional acts of the respondents in the suit to be:

“(i) Issuing a Legal Notice No. 63 of 20th April 2020 stating that the licences held by the 2nd and 3rd Petitioners to operate as export slaughter houses are revoked.

(ii) Issuing a letter dated 22nd April 2020 making reference to legal Notice No. 63 of 20th April 2020 and requiring the 2nd and 3rd Petitioner to suspend further slaughter of donkeys which are gazette as animals for slaughter in Kenya by Legal Notice No. 146 of 1999.”

There is no doubt that the said suit and subject matter are the same as the subject matter in the present suit. Further that the Applicant in the present suit is an applicant in the suit before the court in Milimani High Court.

b) In respect of Petition No. 105 of 2020, the court confirmed through the Deputy Registrar that the parties are: Goldox Limited as Petitioner and Cabinet Secretary Agriculture, and the Attorney General as respondents. The petition was filed on 12th March, 2020.

The prayers sought in the Petition are:

1. *A declaration that the Respondent does not have power or authority to ban any business and particularly the business of donkey slaughtering for export.*

2. *A declaration that the 1st Respondent action of banning the Petitioner’s slaughter business and revoking its licence is unconstitutional, unlawful, unreasonable, arbitrary unilateral, unjustifiable capricious and a breach of the rules of natural justice and a violation of the petitioners rights under Article 27 (1) and 47 (1) of the Constitution.*

3. *An order of certiorari to remove into this court and quash the 1st Respondents decision contained in the statement of Ban on Donkey Slaughtering dated 24th February, 2020.*

The said matter had a hearing date of 5th December, 2020.

9. A perusal of the Petition in the present case discloses as follows:

a) That the Petition in the present case was filed on 28th April 2020, after the petitions aforementioned (Nos 85 of 2020 and 105 of 2020) had been filed in Nairobi.

b) That the subject matter of the ban on donkey slaughter house business and the reliefs sought in the present case are essentially the same as the reliefs sought in the petitions aforementioned in the suits filed in Nairobi.

c) That Legal Notice No. 63 of 2020 and the letter dated 22nd April 2020 by the Ministry of Agriculture addressed to Star Brilliant (the applicant herein), Goldox Kenya Limited, Fuhai Machakos Donkey Slaughter house and Silza Donkey Slaughterhouse in reference to Legal Notice No. 63; and marked SB7 in the verifying affidavit of Justus Maranga herein, are the central and inextricably intertwined subject matter of this dispute between the applicant and the respondents concerning the ban on donkey slaughter houses.

10. It subsequently came to light that the Petitioner had filed Petition No. 85 of 2020 in Milimani Commercial Court but that the same was formally withdrawn only in October, 2020 whilst the present matter was proceeding. Accordingly, there is now no other similar matter by the Petitioner in the Courts. As a result, of the double-filing the court revoked the certification of urgency and condemned the Petitioner to pay all costs of the Certificate of Urgency.

11. Counsel for the Petitioner was adamant that he was not aware of the similar proceedings filed in Nairobi. However, had the proposed Interested Party not disclosed the aforesaid relevant information, the same would not have come to light and the two similar suits by the Petitioner would potentially have proceeded.

Determination of Interested Party’s Application to be enjoined and Objection thereto

12. The Intended Party’s application dated 3rd August 2020 is by one Robert Maitethya in a representative capacity and on behalf of Community Based Organizations (CBOs) involved in Donkey Protection and Welfare in Kenya.

13. The CBOs are identified as Njoro County Donkey Farmers CBO, Kingumimu Farmers CBO, Loitoktok Donkey Welfare CBO, Riasoa Donkey CBO, Nairobi Donkey CBO, Kirinyaga Donkey CBO and Meru County CBO. These organizations are alleged to represent a stock of over 100,000 donkeys in Kenya and collectively identify themselves as the “Alliance of Donkey Owners”. The CBO’s claim to have legitimate direct interest and stake in the proceedings and outcome of the present case.

14. The motion of the Intended Interested Party seeks stay of further proceedings to allow them to be enjoined as Interested Party in the suit and to file responses to the Petition. Their application is premised on the several grounds which essentially support the proposition that donkey slaughter ought not be promoted; that donkey owners have been desperately impacted and disproportionately effected due to slaughter of donkeys for meat and hide; that illegal slaughter and stock theft have increased due to the policy of promotion of donkey slaughter houses leading to decline of donkey species. In short, they support the banning of donkey slaughter houses.

15. In support of its application to be enjoined, Interested Party relies on Article 22 of the Constitution which provides as follows:

“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

16. They have also invoked the Constitution of Kenya (**Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Mutunga Rules)**). In particular they cite **Rule 2** thereof which defines an “Interested Party” as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court, but it is not a party to the proceedings.

17. The applicants urge that with regard to **Rule 2** of the **Mutunga Rules**, the court in **Benjamin K. Kipkurui v County Government of Mombasa and Another (2014) eKLR** affirmed the test for joinder where the court stated that the applicant must demonstrate a legal interest that calls for hearing before a decision on the dispute is adjudicated.

18. The applicants finally submitted that their participation in the proceedings should be permitted because: they have a clear and proximate identifiable interest that should be safeguarded; that they have a significant and relevant role in the donkey welfare sector; that they have actively and passively advocated for the banning of donkey slaughter since 1999 when the donkey was gazetted as a food animal; and that they draw attention to unsustainable slaughter of donkeys, rising insecurity among donkey holding community and loss of livelihoods.

19. The Respondents did not oppose the applicant’s application.

20. The Judicial Review applicant opposes the interested party’s application on three grounds. First, that the interested party being a non-human persona lacks legal capacity to sue or be sued. The argument here is one about lack of *locus standi*. The applicant cited the pre-2010 constitution case of **Dennis Oloigero & 2 Others V The Art of Ventures Limited & 2 Others [2006] eKLR** where the High Court held that a CBO and persons who had described themselves as members of a registered CBO:

“I lack[ed] the legal capacity to commence or maintain the present proceedings since they represent an unlawful society in law.”

21. The Judicial Review applicant further cited **Kituo Cha Sheria v John Ndirangu Kariuki & Another [2013] eKLR** where the court stated:

“44.In the end, I have reached the conclusion that Kituo Cha Sheria is not a competent legal person as known under article 258 of the constitution, section 12 (3) of the Non-governmental Co-ordination Act or any other statute. Its capacity to bring an action in its own name and a petition to challenge an election does not find support in the law or precedent. In the result, there is no petitioner in Court or a valid petition. It follows as a corollary that the petition is incurably defective. It has no legs to stand on. It is hereby struck out and dismissed.”

That case was an election petition and challenged the nomination of the respondent who was elected as Member of Parliament for Embakasi Central Constituency.

22. The second ground is that these are Judicial Review proceedings and are thereby of a special nature, seeking to question the validity of the impugned Legal Notice No. 63 of 2020 by the 1st Respondent. Since Judicial Review concerns the decision making process of public entities and not its merits, there is no basis upon which the intended interested party can show how it will be affected. Reliance is placed on the case of **Republic v Salaries and Remuneration Commission Ex-parte Parliamentary Service Commission & 4 Others [2018] eKLR** where it was stated by the court as follows:

“11. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.”

The court there disallowed the application to enjoin as it saw no justification for so doing.

23. The third ground is based on the technicality that the Interested Party introduced evidence but failed to annex exhibits to their affidavit

securely sealed under the seal of a Commissioner for Oaths.

24. On the third ground of objection, my immediate view is that this Court does not at this stage need to rely on the evidence introduced by the applicant. All that the court needs to take into account is whether there is demonstration that it has an identifiable stake and legal interest in the subject matter of the proceedings. I think from the application and body of the deposition such interest is evident and the failure by a Commissioner for Oaths to sign the annexures is an error of a technical nature that can be corrected.

25. Going back to the first ground on *locus standi*, this matter has been dealt with fairly exhaustively by the courts. In **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR** while referring to the matter of **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010** asserted that:

“.....In Kenya the Court emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.”

That is to say, that, for the court to find *locus standi*, the applicant must demonstrate he has an interest either vested or contingent on the subject matter before the court which interest is a legal one. That interest must be above that of other members of the public in general (See **Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR**).

26. I have carefully considered the provisions of **Article 22** of the **Constitution**. It is clear that every person has the right to institute proceedings in enforcement of the bills of rights, and that the High Court is mandated to hear such proceedings. In particular **Article 22 (2)** of the **Constitution** provides for a person who is acting: in the interest or on behalf of another, or as a member of or in the interest of a group or class of persons, or in the public interest. I think that provision is extremely broad, and when read together with **Rule 2** of the **Mutunga Rules**, the circumstances in which a person may be locked out from instituting proceedings are extremely limited.

27. I am aware that the Interested Party is not seeking to institute a proceedings but merely seeks to be enjoined as party that has an identifiable stake or legal interest in the proceedings, and in that terms of the **Benjamin Kipkurui** case, the legal interest calls for hearing before a decision on the dispute before the court is adjudicated. I am satisfied that the intended Interested Party's interest is safeguarding the welfare of donkeys and their owners. That, in my view, is a sufficiently proximate interest that needs to be heard and taken into consideration before a determination on the issues in the substantive Judicial Review application on whether the legal notice by the Cabinet Secretary was properly made.

28. With regard to the second ground of objection, it is true as argued by the Judicial Review applicant that the interested party played no express role in the decision making process; that the Judicial Review application is a special procedure that evaluates that process; and that it is not the merits of the decision that are in review herein.

29. However, as I understood the interested party's argument, it was - in not so many words - that it had made representations to the Cabinet Secretary prior to the issuance of the legal notice sought to be impugned, and thus had a legitimate interest in the process by which the decision was made; and that the outcome of the Judicial Review proceedings; were therefore of direct legal interest to this stake in the said decision.

30. It appears to me, ultimately, that there is no proper basis to disallow the joinder of the applicant as an interested party. I so find and hold.

31. Accordingly, the intended interested party is hereby permitted to be enjoined as an interested party. As such and to ensure expediency in the proceedings, directions are therefore issued as follows:

1. The Interested Party shall file and serve a reply to the substantive judicial review application within (10) days from the date of this Ruling.
2. Such reply shall be filed and served together with the interested party's submission in response to the Judicial Review applicant's submissions of 11th June, 2020.
3. The Judicial Review applicant shall within ten (10) days of being served file and serve its response to the Interested Party's reply together with supplemental submissions in response to the Interested Party's Submissions.
4. The parties' written submissions shall not exceed four (4) pages in regular font size 12, to which authorities, duly highlighted shall be annexed.

Administrative directions

32. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

33. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

34. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 26th Day of January, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Wairegi for the Applicant
2. Ms Cheruiyot for the Respondents
3. Mr. Karani for the Interested Party
4. Court Assistant - Quinter Ogutu