



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO. 11 OF 2011**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI AND PROHIBITION BY AZAM FOOD PRODUCTS (K) LIMITED**

**AND**

**IN THE MATTER OF: ARTICLES 10(1) AND 14(1), (2), (3) OF THE PROTOCOL ON THE  
ESTABLISHMENT OF THE EAST AFRICAN COMMON MARKET**

**AND**

**IN THE MATTER OF: SECTION 111(1) OF THE EAST AFRICA COMMUNITY CUSTOMS  
MANAGEMENT ACT 2004**

**AND**

**IN THE MATTER OF: ARTICLE 165(6) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**AZAM FOOD PRODUCTS (K) LIMITED.....APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**AND**

**DIAMOND LALJI – CHAIRMAN**

**RAJESH SHAH – SECRETARY**

**BIMAL SHAH– TREASURER.....APPLICANT/INTERESTED PARTY**

**RULING**

1. Diamond Lalji, Rajesh Shah and Bimal shah(Chairman, Secretary and Treasurer) suing for and on behalf of **CEREALS MILLERS ASSOCIATION** (hereinafter referred to as the “*Interested Party*”) first filed an application dated 25<sup>th</sup> May, 2011 and sought to be enjoined as an Interested Party to an

application by way of Chamber Summons dated and filed on 19<sup>th</sup> January, 2011 by **AZAM FOOD PRODUCTS (K) LIMITED** (the *ex parte* applicant) said to be a company whose parent company is incorporated in the Republic of Tanzania a member of the East African Community.

2. After several adjournments, the Interested Party's said application dated 25<sup>th</sup> May, 2011, but filed on 26<sup>th</sup> May, 2011, was heard *inter partes* on 27<sup>th</sup> June, 2012 and was in a Ruling delivered on 26<sup>th</sup> July, 2012 dismissed with costs to the *ex parte* applicant (Azam Foods). It is that Ruling which has given rise to the many spirited efforts by the Interested Party, **firstly** by filing a Notice of Appeal, and **secondly** a Notice of Motion seeking a stay of the order dismissing their applicant to be enjoined as a party. I have no comment on the Notice of Appeal because that is not within the jurisdiction of this Court, the decision having been made by a court of cognate jurisdiction. I will therefore tie this Ruling to the question whether an order of stay of that decision should be granted.

### **THE NOTICE OF MOTION**

3. The Interested Party's Notice of Motion is dated 6<sup>th</sup> August, 2012 and filed on 9<sup>th</sup> August, 2012, and seeks one principal order, namely –

***“..... a stay of these proceedings pending the hearing and determination of the intended appeal from the Ruling of the Court delivered on 26<sup>th</sup> July, 2012.”***

4. Counsel for the Interested Party, the *ex parte* Applicant and the Respondent all filed various affidavits as well as written submissions, which I propose to put in summary form in the following paragraph.

5. The Interested Party's case is well set out in paragraph (b) of the grounds supporting the Motion-

***“b).... the ex parte Applicant having failed to file its substantive Notice of Motion within 21 days of having obtained leave for the Court and in direct contravention of the clear provisions of the law should not be allowed to proceed to either record any consent or to prosecute what is essentially a defective suit.”***

6. Here lies the crux of this entire matter. The question is, having failed to file the substantive motion within the requisite twenty one (21) days as ordered by the presiding Judge on 20<sup>th</sup> January, 2011, is there any suit, a Judicial Review application or any proceedings to stay? With respect to counsel and their instructing clients, I do not think so. These are my reasons.

7. Section 3 of the Civil Procedure Act, (Cap 21 Laws of Kenya) is a saving provision for other special jurisdiction-

***“3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction, a power conferred, or any special form or procedure prescribed by or under any other law for the time being in force.”***

8. There is a host of statutes with their special procedures. The Companies Act, (Cap 486, Laws of Kenya) is one ready example. The Arbitration Act, 1995 (No. 4 of 1995) is another. The statute directly in question or issue here is the Law Reform Act, (Cap 26, Laws of Kenya), Section 8 and 9 thereof. Section 8 prohibits this court in exercise of its civil or criminal jurisdiction from issuing any previously royal/monarchical (prerogative) orders of **certiorari**, **prohibition** or **mandamus**. Section 9 of the Act provides for the power to make rules for the procedure in applying for and grant of leave to commence proceedings for the grant of any of the said orders.

9. Though Order 53 (Applications of Judicial Review) is part of the Civil Procedure Rules, it bears to remember that it is made under Section 9 of the Law Reform Act, and not Section 81 of the Civil Procedure Act. Sections 8 and 9 of the Law Reform Act, and Order 53 of the Civil Procedure Rules

constitute a jurisdiction which is *sui generis* as envisaged under Section 3 of the Civil Procedure Act Itself. This distinction has been well stated in decisions in such cases as **KUNSTE HOTEL LIMITED vs. COMMISSIONER OF LANDS KLR 249** and **WELAMONDI vs. CHAIRMAN ELECTORAL COMMISSION OF KENYA [2002] 1 KLR 486**. Any reference to Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act is therefore incompetent.

10. Timeliness or time limits is the other distinguishing factor between ordinary civil litigation and judicial review. Take the example of contract, an aggrieved party has the luxury of six years to commence his action. In judicial review the outer limit is six (6) months.

11. The other distinguishing factors include the requirement of leave of the High Court before an application for any of the judicial review orders is made. And where such leave is granted the substantive motion or application must be made/filed within twenty one (21) days, or where the court so orders, within a shorter period, or ordered by the Court. That is the requirement of Order 53 rule 3(1).

12. Once the Notice of Motion has been filed within the time prescribed, rule 3(2) also requires service of the Notice of Motion by the *ex parte* applicant upon the respondent giving it at least eight clear days between the service of the Notice of Motion and the day named therein for hearing.

13. Rule 3(2) also requires the *ex parte* Applicant to serve all Persons directly affected, and if the notice concerns any proceedings in court, it shall be served upon the presiding officer to the court and all parties to the proceedings. The rule also requires an affidavit of service be filed showing compliance with the requirements of that rule.

14. Quite often persons affected or likely to be affected, have their eyes on what their competitors are doing, or are upto, and will appear in court even at the *ex parte* or leave stage of judicial review proceedings. Where there is such a coincidence, the courts would usually direct service of the *ex parte* application, and a hearing date **inter partes** of the application, on whether or not, if leave is granted, such leave would operate as a stay to the decision or action being impugned in the application for Judicial Review.

15. In this case, the application for leave was heard and granted on 20<sup>th</sup> January, 2011. The Judge also ordered the *ex parte* applicant to file its substantive motion within twenty one (21) days but the question whether the leave should operate as a stay be argued **inter partes** on 27<sup>th</sup> January, 2011 a week later, when the *ex parte* application would have been served upon the respondent.

16. On 27<sup>th</sup> January, 2011 when parties appeared before court, counsel for the parties adjourned the matter to 3<sup>rd</sup> February, 2011 and indicated that parties would record a consent on the question of stay. There is no record on what happened on 3<sup>rd</sup> February, 2011, but the next date on 4<sup>th</sup> February, 2011, the Nairobi court ordered the file be transferred to this court as the goods and therefore the claim arose within the jurisdiction of this court, and directed mention on 17<sup>th</sup> February, 2011 when the matter was stood over generally.

17. The matter having been stood over generally on 17<sup>th</sup> February, 2011, no significant step was taken by either the *ex parte* applicant or the respondent until the 17<sup>th</sup> June, 2012 when the Interested Party's Notice of Motion was heard, and was dismissed in a Ruling delivered on 26<sup>th</sup> July, 2012. Following the dismissal, the court granted a stay of 14 days of that order of dismissal, pending appeal. In addition there is a further order of the same day/dated (26<sup>th</sup> July, 2012) –

***“By consent of the parties the matter be and is hereby marked as settled with no order as to costs.”***

18. The question or issue here, as I have already stated at the beginning of this Ruling is whether there is any action to stay or are the parties engaged in an academic exercise, and courts do not engage in such

exercises, and its orders are never issued in vain.

19. From both practical and legal point of view, once an application for leave in judicial review has been heard and orders or leave is granted commence judicial review proceedings as was done in this case, the application is spent and is no longer an issue. What becomes an issue for determination is the substantive Notice of Motion as required by Order 53 and the rules thereunder. If the Notice of Motion is **NOT** filed within the time granted the right to do so automatically lapses by operation of law. Neither the *ex parte* applicant nor any interested party has any further recourse under the lapsed orders. Public policy rightly or wrongly militates against the revival of such applications. This is because judicial review orders are issued against illegal, arbitrary and oppressive or abusive exercise of power by public authorities or persons exercising powers granted to them by Statute of the Constitution.

20. Judicial Review Orders are not about the merits of the case. That is a question for the civil jurisdiction of the court. Public policy upon which the welfare and good order of the State and therefore citizenry is dependent, dictates that such challenges on exercise of power by public authorities or persons aforesaid be adjudicated within the timelines set.

21. In this case therefore, there being no Notice of Motion on record, and the application for joinder having been dismissed, I can see no legal basis for maintaining what is clearly a non-existent judicial review application. In the circumstances, any order of stay would be made in **vacuo**. I decline to grant it.

22. Being of that mind the Interested Party's Notice of Motion dated 6<sup>th</sup> May, 2012 is dismissed with costs to the *ex parte* Applicant and the Respondent.

**Dated, Delivered and Signed in Mombasa this 18<sup>th</sup> day of March, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

**In the presence of:**

No appearance for Applicant/Interested Party

Mr. Mohammed for *Ex parte* Applicant

Mr. Twahir for Respondent

Court Assistant - Mutisya