



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Miscellaneous Civil Application 368 of 2010**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF  
CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 1919 OF THE LAWS OF THE AGRICULTURE ACT  
CHAPTER 318 OF THE LAWS OF KENYA**

**IN THE MATTER OF THE HORTICULTURAL CROPS DEVELOPMENT AUTHORITY  
ORDER 1995**

**IN THE MATTER OF THE AGRICULTURAL CROPS DEVELOPMENT AUTHORITY  
(IMPOSITION OF LEVY) ORDER 1995**

**AND**

**IN THE MATTER OF THE CUSTOMS AND EXCISE ACT CHAPTER 472 AND ALL ITS  
BOOKLETS AND SCHEDULES AND OTHER RELATED LEGISLATION THERETO**

**BETWEEN**

**EQUATORIAL NUTS PROCESSORS LTD.....1<sup>ST</sup> APPLICANT**

**SAWA AFRICA EPZ LIMITED .....2<sup>ND</sup> APPLICANT**

**KENYA NUT COMPANY LIMITED .....3<sup>RD</sup> APPLICANT**

**WONDER NUTS (KENYA) LIMITED .....4<sup>TH</sup> APPLICANT**

**AND**

**HON MINISTER OF AGRICULTURE .....1<sup>ST</sup> RESPONDENT**

**RULING**

The subject of this ruling is a notice of motion dated 28<sup>th</sup> November, 2011 and filed in court on the same date by Afri-China International Company (Kenya) Limited (the 1<sup>st</sup> Interested party). In the application which is brought under sections 1A,1B and 3A of the Civil procedure Rules the applicant's main prayer is framed in the following words:-

**“This Honourable court be pleased to review and/or vary its order delivered on 30<sup>th</sup> September, 2011 and discharge the bank guarantee of kshs.15,000,000/= issued by Barclays Bank on 9<sup>th</sup> November, 2011 deposited in court on 11<sup>th</sup> November, 2011 in fulfillment of the court order dated 30<sup>th</sup> September, 2011.”**

The application is supported by ten grounds on its face together with a supporting affidavit sworn on 28<sup>th</sup> November, 2011 by Zhang Pei and annexures thereto.

Equatorial Nuts Processors Limited, Sawa Africa EPZ Limited, Kenya Nut Company Limited and Wonder Nuts (Kenya) Limited (the 1<sup>st</sup> to 4<sup>th</sup> ex-parte applicants in the substantive judicial review application) opposed the application through grounds of opposition dated 20<sup>th</sup> January, 2012 and filed in court on 23<sup>rd</sup> January, 2012. At the hearing of the application on 26<sup>th</sup> January, 2012 Mr. Kiage for the 1<sup>st</sup> respondent (the Minister of Agriculture) submitted on grounds of law in objection to the application. The 2<sup>nd</sup> respondent (the Commissioner of Customs & Excise) filed grounds dated 17<sup>th</sup> January, 2012 in opposition to the application. George M Muchai the Secretary General of the Bakery Confectionary Food Manufacturing and Allied Workers Union (Kenya) (the 2<sup>nd</sup> interested party) swore a replying affidavit on 13<sup>th</sup> December, 2011 in response to the application. Mukure Local Macadamia Self Help Group (the 6<sup>th</sup> interested party) filed grounds of opposition on 24<sup>th</sup> January, 2012. The 9<sup>th</sup> interested party also filed grounds of opposition on 20<sup>th</sup> January, 2012. During the hearing of the application Mr. Musyoki for the 3<sup>rd</sup> interested party was present in court but he indicated that he was not taking any position on the matter. Mr. Kihara who was acting for the ex-parte applicants indicated that he was holding brief for Dr. Khaminwa for the 4<sup>th</sup> interested party and Mrs. Kibe for the 5<sup>th</sup> interested party. He indicated that the 4<sup>th</sup> and 5<sup>th</sup> interested parties were also opposing the application.

A look at the grounds in support of the application and the supporting affidavit shows that the applicant prays to have the ruling of 30<sup>th</sup> September, 2011 reviewed and /or varied on the grounds that complying with the same will result in colossal financial losses to the applicant and that at the time the orders were being made the substratum of the substantive judicial review application had ceased to exist in that the decision of the 1<sup>st</sup> respondent which was being challenged was for a particular period of time and the period of time had ended on 15<sup>th</sup> June, 2011.

A perusal of the papers put forward in opposition to the application shows that the application is opposed on the following grounds:-

- 1. The same does not comply with the requirements of judicial review proceedings;**
- 2. The application is made in furtherance of an illegal act;**

**3. The application is made in bad faith and has no merit;**

**4. Through the application the applicant seeks to correct acts of its own making; and**

**5. That this court has no jurisdiction to review the ruling of 30<sup>th</sup> September, 2011.**

A little history would help us understand how we reached this destination. On 17<sup>th</sup> December, 2010 the ex-parte applicants who are now some of the respondents in this application came to court and obtained orders suspending a Gazette Notice in which the 1<sup>st</sup> respondent had lifted the ban on the exportation of raw macadamia nuts for a period of six months. It is the 1<sup>st</sup> interested party's case that when it learned about the lifting of the ban it took ten containers of raw macadamia nuts to Embakasi inland depot with a view to exporting the nuts. Unknown to the 1<sup>st</sup> interested party the court had issued an order suspending the Minister's lifting of the ban. It could not therefore export the ten containers of nuts. The ten containers were therefore trapped at the 2<sup>nd</sup> respondent's inland depot at Embakasi. The 1<sup>st</sup> interested party moved to court and asked to be enjoined to these proceedings. Its request was granted.

The 1<sup>st</sup> interested party through an application dated 13<sup>th</sup> July, 2011 prayed for the release of the ten containers by the 2<sup>nd</sup> respondent and asked the court to waive the accumulated demurrage and/or warehouse charges and/or other incidental charges in respect of the ten containers. Gacheche, J answered that application through a ruling delivered on 30<sup>th</sup> September, 2011. That is the ruling the 1<sup>st</sup> interested party is asking this court to review.

In her ruling Gacheche, J directed the release of the ten containers on condition that the 1<sup>st</sup> interested party sold the said nuts locally to those who are licensed to deal with macadamia nuts. The release was conditional upon the 1<sup>st</sup> interested party providing a banker's guarantee to the tune of Kshs.375,000,000/=. The banker's guarantee was to be discharged upon the 1<sup>st</sup> interested party concluding the sale of the macadamia nuts to the licensed dealers.

The banker's guarantee was reduced from Kshs.375,000,000/= to kshs.15,000,000/=. The 1<sup>st</sup> interested party partly complied with the ruling by depositing a Kshs.15,000,000/= banker's guarantee in court but when it went to secure the release of the containers, it found that the warehouse rent due was kshs.1,539,795, the storage charges due to Kenya Ports Authority (KPA) was Kshs.5,951,992 and the shipping company was demanding over kshs.5,000,000 as rent for the ten containers.

The 1<sup>st</sup> interested party is now asking the court to discharge the bank guarantee since the same is attracting interest at the rate of 3% per month. The 1<sup>st</sup> interested party did not come out clearly as to what should happen to the ten containers of macadamia nuts.

The 1<sup>st</sup> interested party has directed its application to the heart of this court. The 1<sup>st</sup> interested party is of the view that whatever is happening is beyond its control. The expenses accruing as a result of the ten containers being detained at the 2<sup>nd</sup> respondent's yard are not of its making. This being a court of equity, I will not let the 1<sup>st</sup> interested party's application die at the altar of technicalities. In saying so, I take refuge in the provision of Article 159 (1) (d) of the Constitution which provides that **"justice shall be administered without undue regard to procedural technicalities."**

It was argued by some of the parties who are opposed to the application that the application did not meet the standard of a judicial review application. This argument is correct. Judicial review proceedings are special in nature. They are governed by the provisions of the Law Reform Act and Order 53 of the Civil Procedure Rules, 2010. One can also bring an application by invoking the inherent jurisdiction of the court. The other rules of the Civil Procedure Rules and the provisions of the Civil Procedure Act do not apply. One can therefore fault the 1<sup>st</sup> interested party for quoting Sections 1A,1B and 3A of the Civil Procedure Act. Supposing the 1<sup>st</sup> interested party had not quoted these sections would it still have been said that the application is defective? I do not think so. It is clear by looking at this application that it

appeals to the inherent jurisdiction of this court. I will therefore not knock out the application on this ground. Deciding otherwise would amount to determining this matter on technicalities.

Another argument raised in opposition to the application was that review of a ruling is not available in judicial review proceedings and that the only way out for the 1<sup>st</sup> interested party was to appeal against the ruling dated 30<sup>th</sup> September, 2011. This is an interesting argument. I am aware that once a substantial notice of motion is decided in judicial review proceedings there is no room for review. I however do not find any reason why a ruling delivered in the course of judicial review proceedings cannot be reviewed. This argument is not convincing and I reject it. On the same line it was submitted that a decision that has been reviewed cannot be reviewed again. On this point it was argued that the fact that the banker's guarantee was reduced from Kshs.375,000,000/= to Kshs.15,000,000/= meant that the ruling dated 30<sup>th</sup> September, 2011 had been reviewed. How can we call this a review? The court was requested and it accepted to reduce the banker's guarantee from Kshs.375,000,000/= to Kshs.15,000,000/= This cannot be termed as a review.

It was also argued that the 1<sup>st</sup> interested party is trying to extricate itself out of a situation of its making. It was even argued that the 1<sup>st</sup> interested party was in the process of committing crime when it took its macadamia nuts to the 2<sup>nd</sup> respondent's inland depot at Embakasi. No evidence has been placed before the court to show that the 1<sup>st</sup> interested party was breaking the law when it attempted to export the macadamia nuts. It is not enough to impute criminal motives on a person. He who alleges must go ahead and establish such criminal motives. For now it is safe to assume that the 1<sup>st</sup> interested party was honest in its business activities. There is clear evidence that the 1<sup>st</sup> interested party struggled to have the containers released and its struggles culminated in the orders issued by Gacheche, J on 30<sup>th</sup> September, 2011. The expenses that have accrued in relation to the containers cannot be said to have been of the 1<sup>st</sup> interested party's making.

Having dealt with the objections raised by those opposed to the application, I am of the view that the only question that remains to be answered is whether the 1<sup>st</sup> interested party has satisfied the court that the application for review should be allowed. For the 1<sup>st</sup> interested party to succeed it needed to prove that new material has come to its knowledge which was unknown to it at the time it made its application. Another option was for it to show that there was an apparent mistake in the ruling it seeks to review. The 1<sup>st</sup> interested party can also succeed if it establishes that there is sufficient reason for reviewing the application.

The 1<sup>st</sup> interested party has not demonstrated that it has come into possession of new material nor that there is an apparent error in the ruling of the court. The only issue for this court to decide is whether the 1<sup>st</sup> interested party has established sufficient reason for the review of the ruling.

The charges that the 1<sup>st</sup> interested party owes to KRA and KPA are charges accruing to those public bodies which have been established by statute. In her ruling Gacheche, J stated that those charges have to be paid. I may be mistaken but I seem to get the feeling that the 1<sup>st</sup> interested party wants the court to direct KRA and KPA to waive their charges. This cannot be accepted because in the first place KPA has not been made a party. Secondly those charges are charged in accordance with the provisions of statute. A court of law cannot direct a party to commit a crime. Directing KRA and KPA not to collect the charges will amount to asking them to breach the law. There is an agreement between the 1<sup>st</sup> interested party and the shipping company as to the rents for the containers. This court cannot interfere with that contract by directing the shipping company to waive the rents for the containers. In any case the shipping company is not a party to these proceedings.

There is also a technical aspect in respect of the 1<sup>st</sup> interested party's application. It seeks that the banker's guarantee of Kshs.15,000,000/= be discharged. It however does not seek review of the order directing the release of the containers. The order for the deposit of a banker's guarantee is sewed to the order for the release of the containers. It cannot be severed.

At the end of the day, it is clear that the 1<sup>st</sup> interested party has not given any sufficient reason to this court to make it review the ruling of 30<sup>th</sup> September, 2011. As a consequence the application for review dated 28<sup>th</sup>, November, 2011 is dismissed with costs to the parties who have responded to this particular notice of motion.

Dated and signed at Nairobi this 16th day of February , 2012 .

**W. K. KORIR**  
**JUDGE**