



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVIEW NO. 17 OF 2010

**IN THE MATTER OF: AN APPLICTAION BY BUTALI SUGAR MILLS LTD
FOR ORDERS FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF MANDAMUS &
PROHIBITION**

AND

IN THE MATTER OF: THE KENYA SUGAR BOARD

AND

**IN THE MATTER OF: AN APPLICTAION FOR AN OPERTAING LICENSE
FOR SUGAR MILLING UNDER SECTION 15 OF SUGAR ACT NO. 10 OF 2001**

RULING

The application by the intended interested party, **West Kenya Sugar Company Ltd** is dated 26th June 2010 and is brought under Section 1A, 1B, 1C, 3A of the Civil Procedure Rules and Order 53 Rule 3 (2) and (4) of the Civil Procedure Rules. It seeks orders that:-

- (1) The application be certified urgent and be heard forthwith ex-parte in the first instance.**
- (2) West Kenya Sugar Company Ltd be joined in these proceedings as interested party.**
- (3) Butali Sugar Mills Ltd through its advocate on record do serve West Kenya Sugar Mills Ltd with copies of the Chamber summons pursuant to which leave to commence these proceedings was obtained as well as the Notice of Motion statement accompanying the application for leave and copies of all and any affidavits accompanying the application for leave and annexures thereto.**
- (4) Such time as the court shall deem just and appropriate be given to West Kenya Sugar Mills Ltd within which to file and serve an affidavit or move in response to the application of the applicant.**
- (5) Such other or further orders be made as the court shall deem just and expedient to meet the ends of justice in these proceedings.**

Prayer (1) above is already spent and prayer (2) is the main prayer. Prayers (3), (4) and (5) are dependant on the grant or otherwise of prayer (2).

The application is anchored on fifteen (15) grounds viz:=-

- (1) The applicant West Kenya Sugar Co Ltd is a limited liability company and a licensed sugar miller having its sugar mill within Kakamega District Western Province.**
- (2) There is an existing written agreement entered into by the applicant on the one part and the Kenya Sugar Board on the other part by which the Board bound itself not to license another sugar**

millers within a radius of 24 kilometers of the applicant's mill.

(3) The applicant has sued the Board and there is pending in court NBI HCCC NO. 206 OF 2010 – West Kenya Sugar Co Ltd vs= The Kenya Sugar Board by which the applicant seeks to enforce the said contract.

(4) Butali Sugar Mills Ltd has at all material times been aware of the existence of the said agreement.

(5) The applicant in this notice of motion has become aware that Butali Sugar Mills Ltd has commenced proceedings for judicial review in the nature of mandamus and prohibition

(6) By the said proceedings Butali Sugar Mills Ltd wants the court inter – alia to compel the Kenya Sugar Board to issue it with an operating license to commence milling sugar in within a radius of 24 kilometers of the applicant's mill.

(7) The license if granted will enable Butali Sugar Mills Ltd to source for sugar cane in North Kabras, Matete, Lugari, Luadeti, Nandi and Uasin Gishu areas which are the applicant's "exclusive zone".

(8) An application for such license was sought by Butali Sugar Mills Ltd as far back as the year 2008.

(9) The grant of such license has been opposed by the applicant for among others the reason that it will infringe on the exclusive rights of the applicant to mill sugar cane developed within a 24 kilometers radius of its factory in Butali.

(10) The license now being sought by Butali Sugar Mills Ltd is a direct assault on the statutory and contractual rights of the applicant not to have another factory within a 24 kilometers radius of its factory.

(11) Butali Sugar Mills Ltd in its application has concealed from the court material fact that the applicant is a party directly affected by the application of Butali Sugar Mills Ltd.

(12) The applicant desires to be heard in opposition to the application by Butali Sugar Mills Ltd.

(13) The application by Butali Sugar Mills Ltd has been set down for hearing on 30th June 2010. The applicant herein has neither been served with court processes pertaining to the application by Butali Sugar Mills Ltd nor a hearing notice.

(14) Unless this application is heard and granted before the hearing by Butali Sugar Mills Ltd the applicant will be unable to ventilate its case based on its rights derived from the Sugar Act 2000 and its contract with the Kenya Sugar Board.

(15) The application by Butali Sugar Mills Ltd is instituted such that it has neither applicant, respondent nor interested party hence the difficulty of describing parties therein.

These grounds are based on the facts contained in the supporting affidavit of the applicant's Chairman **Jaswant S. Rai** dated 26th June 2010 and a further affidavit dated 30th September 2010. The grounds and the supporting facts were argued on behalf of the applicant by learned counsel **Mr. O. P. Nagpal**, who appeared together with the learned counsel, **Mr. Wasuna**.

The learned counsel, **Mr. A. B. Shah** assisted by the learned counsel, **Mr. P. J. Otieno**, opposed the application on behalf of the applicant in the substantive motion i.e. Butali Sugar Mills Ltd while learned counsel **Mr. Julius Kemboi**, assisted by learned counsel, **Miss Adhiambo**, opposed the application on behalf of the respondent in the main motion i.e. Kenya Sugar Board. In its opposition to the application Butali Sugar Mills Ltd filed a replying affidavit dated 20th September 2010 deposed by its director, **Sanjay Jayantilal Patel**.

The replying affidavit together with the supporting affidavit by the applicant have carefully been considered in the light of the grounds for the application and the lengthy submissions made by the applicants learned counsel and the responses thereto by the respondents learned counsels. The issues that emerge for determination are two fold viz:

(1) Whether the application as presented, is proper and competent.

(2) Whether the applicant has shown sufficient cause to be joined as a party to the judicial review application filed by the respondent Butali Sugar Mills Ltd against the respondent Kenya Sugar Board.

With regard to the first issue, it is noted that the application is brought by way of notice of motion under Section 1A, 1B, 1C and 3A of the Civil Procedure Act and Order 53 Rule 3 (2) (3) and (4) of the Civil Procedure Rules. The main prayer is for joining the applicant as a party to the judicial review application. This being so, it would follow that other than Order 53 of the Civil Procedure Rules, the rest of the provisions of the Civil Procedure Act and Rules would not apply herein. Such provisions would include Order 50 of the Civil Procedure Rules by which a notice of motion is taken out. This legal position has been confirmed in a number of cases including **Welamondi =vs= The Chairman Electoral Commission of Kenya [2002] 1 KLR 486**, where the High Court (**Ringera J**) held “inter – alia” that “judicial review proceedings under Order 53 of the Civil Procedure Rules are a special procedure, which are invoked whenever Orders of certiorari, Mandamus and prohibition are sought in either criminal or civil proceedings and in exercising powers under Order 53 the court is exercising neither civil nor criminal jurisdictions in the strict sense of the word. It is exercising jurisdiction “**sui-generis**”. It therefore follows that it is incompetent to invoke the provisions of Section 3A and Order 1 Rule 8 of the Civil Procedure Act and Rules and Section 42, 79 and 80 of the Constitution of Kenya”

In the case of **Mr. Justice N. N. Ole Keiwua & Another =vs= Yash Pal Ghai Chairman The Constitution of Kenya Review Commission & others NBI HCCC MIS APP NO. 1110 of 2002**, a two judge bench composed of **A. I. Hayanga** and **A. Visram JJ** traced the genesis of the High Court supervisory jurisdiction under Order 53 of the Civil Procedure Rules and noted that Section 8 (2) of the Law Reform Act enabled the High Court to issue orders of mandamus, prohibition and certiorari in situations where the High Court of Justice in England would have a similar power and that in 1992 by legal notice number 164 of 1992 the heading “**Orders for mandamus, prohibition and certiorari “ was changed to “application for Judicial Review”**. The learned Judges made it clear that the reason for their brief outline of the historical backgrounds was to emphasize that proceedings under Order 53 are special proceedings for special purposes having special and specific rules of its own. They said that these special rules have been enacted pursuant to powers donated to the Rules committee under Section 9 of the Law Reform Act. Accordingly, Order 53 assumes the force of law from an Act of Parliament i.e. the law Reform Act and not from the Rules Committee established under Section 81 of the Civil Procedure Act and that makes proceedings under Order 53 Special proceedings as was stated by the Court of Appeal in **R =vs= Communications Commission of Kenya Civil Appeal No. 175 of 2002**.

The learned Judges continued to state that judicial review proceedings are neither civil nor criminal as was stated by the Court of Appeal in **The Commissioner of Lands =vs= Kunste Hotel Civil Appeal No. 234 of 1995**. They went on to state that judicial review proceedings are neither “**an action**” as defined in the Interpretation and General Provisions Act or “**a suit**” as defined in the Civil Procedure Act. The learned Judges then held that proceedings under Order 53 are special in nature, that Order 53 stands on its own with its own rules and that the Civil Procedure Rules relied on by the applicants’ counsel are not available to the applicants and that the fact is acknowledged by Section 3 of the Civil Procedure Act which states that:-

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

With that, the learned judges found that Order 53 creates that special jurisdiction envisaged in the aforesaid Section 3 of the Civil Procedure Act having its own rules and proceedings.

This court finds itself unable to depart from the solid findings made in the aforementioned decisions which confirm and affirm the legal position that proceedings under Order 53 of the Civil Procedure Rules are of a special nature such that the other provisions of the Civil Procedure Act and Rules would not apply to them. **(See also, Rep =vs= Kenya Bureau of Standards & others [2006] e KLR**. It is instructive to note that in the **Justice Ole Keiwua** case above, an oral application was made by intended interested parties to be joined as interested parties in the main judicial review application. The issue was whether a formal application under Order 50 of the Civil Procedure Rules was necessary to enjoin an interested party in the judicial review application. Another issue was whether the rules of procedure made pursuant to the Civil Procedure Act were applicable to applications for judicial review under Order 53. It

was held that Order 50 of the Civil Procedure Rules was not applicable to proceedings under Order 53 and that it was not obligatory upon intended interested parties to make formal application to be enjoined in the proceedings and that any interested party has a right to be heard as provided for in Order 53 Rule 6 provided that the interested party is able to persuade the court that he or she is a proper person to be heard.

Therefore, with regard to the first issue for determination in this present application, this court finds that the application is misconceived and incompetent in as much as it is brought under Section 1A, 1B, 1C and 3A of the Civil Procedure Act. Indeed, learned counsel, **Mr. Otieno** contended that there cannot be a notice of motion within a notice of motion and that Order 53 does not allow the filing of an application of this nature such that the Civil Procedure Act cannot be imported into the application. This contention is solidified by the decision of the Court of Appeal in the case of **Abercrombie and Kent Ltd & Another vs Republic Civil Appeal No. 195 of 1994**, where it was observed that the propriety of making a notice of motion within a notice of motion is doubtful under Order 53 of the Civil Procedure Rules.

What about Order 53 Rule 3 (2) (3) and (4) of the Civil Procedure Rules which has also been invoked in this application?

Mr. Kemboy, learned counsel, contended that the provisions cannot come to the aid of the applicant as they deal with parties who are required to respond to the notice of motion for judicial review. Counsel further contended that Order 53 Rule 6 is the correct provision and is the gateway for a party to come into this matter and since this application is not made under the provision then it is defective and incurable.

Mr. Nagpal, learned counsel responded by taking the view that Order 53 Rule 6 does not exist in a vacuum and should follow the rules preceding it as it does not reflect the applicant's position. He contended that the applicant does not desire to be heard but only to be made an interested party under sub-rule (4) and that if a party is served with the notice of motion and desires to oppose, then he would come under Rule 6 of Order 53.

Learned counsel clearly implied that the applicant could not come under Rule 6 of Order 53 because it has not been served with the necessary notice of motion which is yet to be heard.

Order 53 Rule 3 (2) provides that:-

“The notice shall be served on all persons directly affected and where it relates to any proceedings in or before a court and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings”.

Rule 3 (3) provides that:-

“An affidavit giving the names and addresses of and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing and if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall be before the High court on the hearing of the motion”.

Rule 3 (4) provides that:-

“If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing in order that the notice may be served on that person, upon such terms (if any) as the court may direct”.

Mr. Nagpal, indicated that the applicant comes under Rule 3 (4) because it only wants to be made on interested party. However, the aforementioned provisions are clear and tend to lean towards showing that a party seeking to be joined in a judicial review application would not depend on them for that purpose. They seem to apply to parties who are already parties to such application or those who may be joined as parties at the discretion of the court.

Under Rule 3 (4) of Order 53 which forms the foundation of the present application the onus is upon the court to order service of the application upon any person who ought to have been served but was not served. So the present application cannot be founded on that provision. Indeed this was the position taken in the case of **Leonard Namutoko Kiprop Moss =vs= Kenya Airports Authority & Another** which this court agrees with. It is therefore apparent that the application as presented is incompetent and falls for dismissal on that ground alone.

If anything, the applicant should have come under Rule 6 of Order 53 which gives an interested party the right to be heard. The provision provides that:-

“On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons and shall be liable to costs in the discretion of the court if the orders should be made”.

It is clear from the foregoing that even if a person desires to be heard and thus become a party to a judicial review application, the appropriate application has to be made at the hearing of the judicial review motion.

Be that as it may, and assuming that this present application was proper and competent, the next issue for determination would be whether the applicant has shown sufficient cause to be joined as a party in the material judicial review application.

To start with, parties to a judicial review application would be the ex-parte applicant, the respondent and may be interested party.

The respondent would usually be the public body whose decision action or failure to act is under challenge. In this case, we have the applicant, Butali Sugar Mills Ltd and the respondent, Kenya Sugar Board.

The intended interested party, West Kenya Sugar Co Ltd has not been joined as a party and in seeking to be so joined has filed an application which has already been found to be faulty and incompetent.

If West Kenya Sugar Co Ltd was not joined as a party from the start it meant that its presence was insignificant and both the ex-parte applicant and the respondent considered it unnecessary to include them in a dispute which is essentially between them (Butali Sugar Mills and Kenya Sugar Board). A look at the applicant’s grounds for present the application may give an insight into the applicant’s intention to come into the matter.

Ground (a) shows that the applicant is a licensed Sugar Miller having Sugar Mills in Kakamega District.

Grounds (b) refers to an agreement between the applicant and the respondent – Kenya Sugar Board in which the board allegedly bound itself not to license another sugar miller within a radius of 24 kilometers. The agreement would not be a subject in the judicial review application by the ex-parte applicant (Butali Sugar Mills) against the Sugar Board. If the agreement does indeed exist and is valid, its enforcement may be pursued in any civil court of competent jurisdiction. There could be a claim based on the terms and conditions of the agreement. This could open way to a claim for damages pitting the applicant against the Sugar Board.

Ground (c) shows that the applicant has already taken the necessary action against the Sugar Board by instituting **NBI High Court Civil case number 206 of 2010 West Kenya Sugar Co Ltd =vs= The Kenya Sugar Board**. This court was informed herein that in the said civil suit the ex-parte applicant was made a party and that there was an application for a temporary injunction made by the applicant herein against the Sugar Board which application was heard and dismissed. A copy of the relevant ruling by **Koome J** was provided herein.

A perusal of the said ruling by this court reveals that most of the issues raised therein in relation to the alleged agreement between the applicant herein and the Sugar Board have also been raised herein. This court cannot sit on appeal against the decision of a court with concurrent jurisdiction. However, this court is not precluded from acknowledging that if an application for a temporary injunction was dismissed then it meant that the applicant did not demonstrate a prima – facie case with a high probability of success

against the Sugar Board. It is instructive to note that the suit is based on the agreement which the applicant relies on to show that it needs to be joined as a party in the judicial review application. It is therefore not difficult to opine that the applicant seeks to obtain herein that which it failed to obtain in the aforementioned case when it applied for a temporary injunction against the Sugar Board.

Ground (d) is an indication that the ex-parte applicant (Butali Sugar Mills) has at all material times been aware of the alleged agreement. However, being aware of an agreement is not the same thing as being party to the agreement. This ground adds no value to this application since the ex-parte applicant's knowledge of the said agreement was reflected in the civil suit aforementioned.

Grounds (e) and (f) shows that the applicant learnt of this judicial review application proceeding in which the ex-parte applicant seeks an order compelling the Sugar Board to issue it with an operating license to commence milling sugar within a radius of 24 kilometers of the applicant's mill.

Ground (g) shows that the applicant is fearful that if the license sought is granted, it will interfere with its **“exclusive zone”**.

Ground (h) shows that the ex-parte applicant has sought for such a license since 2008 and ground (i) shows that the applicant has all along objected on the basis that it will interfere with its exclusive rights.

Grounds (e) to (i) clearly show that the applicant's intention to be joined as a party to the judicial review application is to foster or enhance its continued objection to the grant of a license to the ex-parte applicant. Already, the applicant is pursuing that formidable objection in its civil case against the Sugar Board based on the alleged agreement which gave it what is termed an exclusive zone. The ex-parte applicant has nothing to do with that agreement and would not be held responsible if the Sugar Board grants or denies to grant the license and since the matter is being legally addressed in another forum it would not be far-fetched to opine that the applicant herein is committed to bring its “wars” with the Sugar Board into these proceedings. Nobody is preventing the applicant from pursuing its rights under the agreement with the Sugar Board but why drag the ex-parte applicant into the matter?. It seems to this court that although the applicants alleged rights are being addressed elsewhere, it seeks to come into this matter as a “spoiler” against the ex-parte applicant. That is outright mischief and a gross abuse of the court process particularly considering that the applicant had previously filed and withdrawn a judicial review application against the Sugar Board. Why then should it be interested in another's judicial review application if not to erect obstructions against the ex-parte applicant pursuit of a license from the Sugar Board.

The applicant's interest in a matter essentially between the ex-parte applicant and the Sugar Board should not be made to prejudice the rights of an innocent party. In any event, there is no guarantee that the orders sought by the ex-parte applicant will be granted by the court whether or not they are conceded by the Sugar Board.

Grounds (f), (k), (l) are a further demonstration of the applicant's grievance with the ex-parte applicant's judicial review application. Both are sugar millers. They are in direct competition but it is apparent that one would want an upper hand by obstructing anything of advantage to the other. But even in competitions, there must be fairness and an equal level playing round. If the Sugar Board is not providing such, as is required to do, there would be nothing to stop the aggrieved party from seeking compensation for damages occasioned by the Board's action and incurred by the player. Each of the players would have a right to take necessary legal action against the Sugar Board. This explains why there is the Nairobi Civil suit and this judicial review application.

Ground (m) shows that the applicant has not been served with process regarding the judicial review application by the ex-parte applicant. But then, the applicant is not a party to the application and has not been made a party by the court..

Ground (n) indicates that the applicant's rights derived from the Sugar Act would be prejudiced by this application. This has not been established. In any event, the applicant's quarrel is with the Sugar Board and not the ex-parte applicant.

Ground (o) would only apply for purposes of challenging the validity of the substantive notice of motion for judicial review order and only if the applicant was a party in the application which it is not.

For all the foregoing reasons, this court is very inclined to find that the applicant has failed to demonstrate good faith and show sufficient cause for it to be joined as a party to the pending judicial review application.

Accordingly, the application dated 26th June 2010 is dismissed for want of competence and merit. Costs be to the respondents Butali Sugars Mills Ltd and Kenya Sugar Board.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 8th day of October 2010

J. R. KARANJA
JUDGE

JRK/aao