



REPUBLIC OF KENYA

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO COMMENCE JUDICIAL
REVIEW PROCEEDINGS BY RASHMI CHAMANLAL KAMANI & DEEPAK CHAMANLAL
KAMANI**

IN THE MATTER OF A REQUEST FOR MUTUAL LEGAL ASSISTANCE

1. RASHMI CHAMANLAL KAMANI

2. DEEPAK CHAMANLAL KAMANI..... APPLICANTS

V E R S U S

THE ATTORNEY-GENERAL..... RESPONDENT

R U L I N G

Before me is a Chamber Summons dated 27th May, 2009 filed by M/S Ngatia & Associates advocates for the applicants named as **RASHMI CHAMANLAL KAMANI** and **DEEPAK CHAMANLAL KAMANI**. The respondent is named as the **ATTORNEY GENERAL**. The application is said to have been brought under Order 53 of the Civil Procedure Rules. The orders sought are as follows-

(a) *Due to urgency, notice to the Registrar be dispensed with.*

(b) *Leave be granted to the Applicants to commence judicial review proceedings seeking the orders of certiorari and prohibition as pleaded in the Statutory Statement herein.*

(c) *That the grant of leave do operate as a stay of the implementation of the purported request for Mutual Legal Assistance dated 30th April, 2009 and/or receiving any report emanating therefrom and for acting upon any such report and/or publishing any report so received or using the report so received in any manner whatsoever pending the determination of this suit.*

The application was filed with a **STATUTORY STATEMENT** dated 27th May, 2009, as well as an **AFFIDAVIT** sworn by **DEEPAK CHAMANLAL KAMANI** (*the 2nd applicant*) on 27th May, 2009.

The grounds of the application are, inter alia, that by a letter dated 30th April, 2009 the respondent purported to seek Mutual Legal Assistance from the United States of America Central Authority claiming to be the competent authority; that there were errors of precedent facts in that a “**competent authority**” for the purpose of making a request for Mutual Legal Assistance has been introduced in the Mutual Legal Assistance Bill, 2009 which has not yet been enacted in Parliament; that the respondent made a detailed legal opinion in which the Respondent represented that the Respondent had perused the contract and the person who signed the contract on behalf of the Government of Kenya was authorized in law to do so, that the errors of precedent fact are fundamental and entitle this Honourable Court to review the decision made by the Respondent. A number of case authorities were cited, such as **BANK OF INDIA -VS- BANCO ARAB ESPANOL [2002]338; SCHREIBER -VS- CANADA; TREUHAND AG -VS-**

ATTORNEY-GENERAL. As well, reliance was also placed on a Kenyan case **REPUBLIC –VS- KENYA ANTI-CORRUPTION COMMISSION – Ex-Parte First Merchantile Securities Corporation Nairobi HC Misc. Application No. 695 of 2007.**

Counsel for the applicants, Mr. Ngatia, also addressed me in support of the application. Counsel emphasized that the request from the respondent may be implemented at any time. That request was invalid, as long as the pending Bill has not been passed by Parliament.

I have considered the application, documents filed and the submissions of counsel for the applicants as well as the authorities cited.

The application before me is the Chamber Summons for leave to institute judicial review proceedings. In such an application the applicant has to demonstrate to the court that he has a sufficient interest in the subject matter. Secondly, the applicant must demonstrate that he has an arguable case.

On the issue of sufficient interest, I observe that in the main body of the application, and the **STATUTORY STATEMENT** filed with the application, the applicants do not disclose who they are and in what capacity they consider that they have an interest in the thing or action sought to be challenged through judicial review proceedings. In the **AFFIDAVIT** sworn on 27th May, 2009 **DEEPAK CHAMANLAL KAMANI** (*the deponent*) merely describes himself as the 2nd applicant and deponed that he was authorized to swear the affidavit also on behalf of the 1st applicant. The relationship between the 2nd applicant and the 1st applicant is not disclosed or described. A perusal of the **LETTER OF REQUEST** by the Attorney-General (*respondent*) dated 30th April, 2009, however reveals the name of the deponent of the affidavit as a person under investigation in the following terms-

“E. Persons and Companies under Investigation.

I. Name: Deepak Chamanlal Kamani

Date of Birth: 1942

Nationality: Kenyan

Address: P. O. Box 13885 00100

Nairobi.

I have not seen the name of the 1st applicant **RASHMI CHAMANLAL KAMANI** anywhere in the documents sought to be challenged. Nor have I been given any explanation as to where he comes in or what specific interest he has in the matter. It is an obligation of applicants in judicial review proceedings to disclose all material facts. In my view, the above are material facts which should have been disclosed. In absence of the same, I am left to speculate. I will not speculate. I find that though the 2nd applicant has demonstrated a sufficient interest, the 1st applicant has not. I will not grant leave to the 1st applicant to file judicial review proceedings, because once he has not demonstrated a sufficient interest, he cannot demonstrate an arguable case.

On the limb of an arguable case, it was contended that the Attorney-General of Kenya (*the respondent*) does not have the legal mandate to ask for Mutual Legal Assistance, the way he did. On the facts placed before me, I am of the view that that is an arguable issue, as far as the 2nd applicant is concerned. I will grant leave to the 2nd applicant to file judicial review proceedings.

Let me mention here that, court cases, both from outside Kenya and one from Kenya were cited to me. In my view, those cases go to the substantive decision on merits, rather than the arguable case standard that is required at the leave stage. Those cases appear to be decisions made after hearing parties on all sides.

I have been asked to grant a stay of implementation of the request for Mutual Legal Assistance through the letter dated 30th April, 2009 and matters related thereto. I do not think that ordering a stay is appropriate. The letter from the respondent under challenge was dated on 30th April, 2009 which is about a month ago. This application was merely filed on 28th May, 2009. In my view, this is a matter that needs to be fast tracked, rather than granting stay orders at this time of leave stage.

Consequently, and for the above reasons, I order as follows-

1. *I dispense with the requirement for service of prior notice on the Registrar.*
2. *Leave be and is hereby granted to the 2nd applicant DEEPAK CHAMANLAL KAMANI to file judicial review proceedings for certiorari and prohibition as requested. The Notice of Motion will be filed within 21 days from today.*
3. *I decline to grant leave to file judicial review proceedings by RASHMI CHAMANLAL KAMANI.*
4. *I decline to grant stay orders.*

Dated and delivered at Nairobi this 4th day of June, 2009.

GEORGE DULU

JUDGE.

In the presence of-

Mr. Ngatia for the applicants

Kevin Court Clerk.