



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Civil Application 447 of 2008

REPUBLICPLAINTIFF

VERSUS

KENYA PORTS AUTHORITYDEFENDANT

GRAIN BULK HANDLERS LIMITEDEX-PARTE

RULING

On the 2nd day of October 2008, this court granted Grain Bulk Handlers Ltd, leave of 21 days to institute judicial review proceedings in the nature of certiorari and prohibition against the decision of Kenya Ports Authority. Pursuant to the aforesaid leave, Grain Bulk Handlers Ltd, hereinafter referred to as the Respondent, filed the substantive motion dated 21st October 2008 in which it sought for the following orders:

1. An Order of Certiorari to remove into the High Court of Kenya and quash the Notice inviting expression of interest licensing of the second Grain Bulk Handling facility at the Port of Mombasa issued by the Kenya Ports Authority and published amongst other publications in the Daily Newspaper on 22nd September 2008.
2. An Order of prohibition directed to the Kenya Ports Authority prohibiting the Kenya Ports Authority from proceeding further with the process of licensing or establishing a second grain bulk handling facility.
3. Costs of the proceedings be provided.

Coast Silos Ltd, hereinafter referred to as the applicant successfully applied to be joined to these proceedings as an interested party. Upon being joined as an interested party Coast Silos Ltd, took out the Notice of Motion dated 16th February 2009 in which it prayed for the following orders:

1. That the leave granted by this Honourable Court on the 2nd October 2008 to the ex-parte applicant herein to apply for orders of Certiorari and Prohibition be set aside;
2. Further and or in the alternative the operation of the grant of leave as a stay of the proceedings in question until the hearing and determination of the judicial review proceedings be vacated set aside and or discharged forthwith;
3. The Chamber Summons dated 2nd October 2008 and all proceedings filed thereafter pursuant to the leave be dismissed with costs
4. That the costs of this application be provided for.

The aforesaid motion is the subject matter of this ruling. The motion is supported by the affidavit of Said Salim sworn on 3rd March 2009.

Grain Bulk Handlers Ltd (Respondent) opposed the motion by filing the replying affidavit of Jonathan James Stokes sworn on 6th May 2009.

When the motion dated 16th February 2009 came up for hearing, Msrs Kassim Shah and Taib argued for the application on behalf of the applicant whereas Msrs Norwojee and Mogaka argued against the motion on behalf of the Respondent. The first point argued by the applicant is the effect that leave should not have been granted because the dispute arose out of a contractual relationship hence judicial review proceedings are inapplicable. Secondly, it is argued that the Respondent is guilty of material non-disclosure. The applicant pointed out that the Respondent failed to disclose when it appeared *ex parte* that there were pending proceedings over the same dispute between it and various interested parties. It is also alleged that the Respondent failed to disclose which law Kenya Ports Authority breached when inviting expressions of Interest to establish a second grain bulk handling facility. Thirdly, it is said there was an inordinate delay to file the substantive application upon obtaining leave hence the Respondent was accused of not being diligent. Fourthly, it is argued that the offending notice issued by the Kenya Ports authority has been withdrawn hence the foundation of the proceedings has been destroyed.

The respondent vehemently opposed the motion for various reasons. It is argued that the motion is vexatious and frivolous in that it seeks to have the substantial application determined through it yet that is the role of the trial judge. Secondly, it is said that the existence of an alternative remedy is no bar to one taking out judicial review proceedings. Thirdly, it is stated by the Respondent that there was legitimate expectation created by the master plan which needs to be investigated. Fourthly, it is stated that the Respondent is not guilty of material non-disclosure because the cases cited by the applicant have no bearing in this case.

I have carefully considered the grounds set out on the face of the motion dated 16.02.2009 plus the facts deponed in the affidavit filed for and against the motion. In a nutshell, the applicant is seeking to have the order for leave given on 2/10/09 set aside. The court of Appeal laid out the principles to be considered before setting aside the order for leave in Aga Khan Education Service Kenya =vs= Ali Seif & others as follows:

“We would caution practitioners that even though leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases.....

Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made six months prior to the applicant coming to court, and there is, therefore no prospect at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside.”

Can the motion before this court be said to be a clear cut case? In my mind, the only serious issue is whether or not the dispute arose out of a contractual obligation. The answer is yes and no. The Respondent had an agreement with Kenya Ports Authority, a contract giving it monopoly to handle grains on preferential terms. It is not in dispute that the term of the contract lapsed in February 2008. At the time of filing this motion the agreement which gave the Respondent the monopoly as a grain bulk handler had lapsed. The issue of the contract being discussed in these proceedings cannot therefore be wished away. The second limb of the argument is that the Kenya Ports Authority has launched a master plan which was later adopted. The issue of grain bulk handling facility was specifically raised. It is the submission of the Respondent that it had a legitimate expectation of being heard and considered before the master plan can be implemented. On this score I agree with the Respondent’s argument that the issue needs to be investigated at the trial of the substantive motion. The other grounds raised in support and against the motion in my view are matters which should be argued when the substantive motion dated 21.10.2008 comes up for hearing. Let me hasten to state that at the *ex parte* stage of leave the court is not required to go into the matter in depth. It is required to peruse, which this court did, the material placed before it and be satisfied that there is a *prima facie* case to be argued at the substantive stage. I have purposely decided not to consider the other grounds which were raised in the hearing of the motion to avoid trespassing into the trial judge’s jurisdiction.

In the final analysis and for the above reasons I dismiss the motion dated 16th February 2008 with costs to the Respondent.

Dated and delivered at Mombasa this 23rd day of July 2009.

J.K. SERGON

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