



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS CIVIL APPLICATION 214 OF 2008**

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

**AND**

**IN THE MATTER OF: SECTION 191 OF THE AGRICULTURE ACT CHAPTER 318**

**AND**

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

**AND**

**IN THE MATTER OF: THE AGRICULTURAL PRODUCE (EXPORT) ACT, CHAPTER 319 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE HORTICULTURAL 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 THERETO, AS READ WITH THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004 (NO. 1 OF 2005)**

**BETWEEN**

- 1. EPHANTUS NYAGA NGIRI**
- 2. DANIEL KARANJA NJUGUNA**
- 3. JAPHETH MUGAMBI ARTHUR**
- 4. ZABLON MWANGI KARIUKI**
- 5. FRANCIS NJERU NJOGU**

6. JOHN NJAGI MICHAEL

7. ESTHER MUMBI MAINA.....APPLICANTS

AND

HORTICULTURAL CROPS DEVELOPMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT

COMMISSIONER OF CUSTOMS & EXCISE.....2<sup>ND</sup> RESPONDENT

### RULING

Before me is a Chamber Summons dated 22<sup>nd</sup> April 2008 filed by C.N. Kihara & Company advocates on behalf of 7 applicants. The respondents are named as HORTICULTURAL CROPS DEVELOPMENT AUTHORITY and COMMISSIONER OF CUSTOMS & EXCISE. The application seeks for leave from court to file Judicial Review Proceedings for mandamus and prohibition. It also seeks for orders that the leave, if granted, do operate as a stay – which is described as an order directing or ordering the respondent to enforced prescribed laws in the macadamia industry. The application was filed under certificate of urgency. The applicants also undertook, in the application, to compensate the respondents for any loss or damages incurred.

The application was filed with a statutory STATEMENT OF FACTS. It was also filed with a supporting affidavit sworn by EPHATNUS NYAGA NGIRI, one of the applicants. Notice to the Registrar was also filed.

Mr. Kihara for the applicants made submissions before me. The thrust of his arguments were that the respondents had failed to exercise their statutory powers to prevent unlicensed agents from getting involved in the macadamia industry resulting in, inter alia, damage to macadamia plants, harvesting of immature fruits, and exporting low quality macadamia nuts to the detriment of the applicants.

I have considered, the application, documents filed as well as the submissions of counsel for the applicants. I am of the view that the applicants have a sufficient interest in the matter. They have also demonstrated a prima facie arguable case. I will grant them leave to file Judicial Review proceedings.

The applicants have requested that the leave do operate as a stay, by this court ordering the respondents to perform their statutory functions. In my view, granting the stay requested would be issuing interim orders in the form of mandamus. Such is not allowed by the law. Stay orders can only be granted with regard to applications for certiorari and applications for prohibition. They do not apply to orders which are mandamus in nature, which are in the nature of ordering a public authority to perform its statutory functions. This, in my view, is what is clearly stated under Order 53 rule 1(4) of the Civil Procedure Rules which provides -

**“1 (4) the grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Judge orders otherwise.”**

In view of the above provisions of the law, I will not grant the stay orders sought.

Consequently, I order as follows:-

1. I certify the chamber summons dated 22<sup>nd</sup> April 2008 as urgent.
2. I grant leave to the applicants to file Judicial Review proceedings as requested under prayer 2

**and 3 of the Chamber Summons. The main motion will be filed within 21 days from today.**

**3. I decline to grant stay orders.**

**4. Costs in the cause.**

Dated and delivered at Nairobi this 29<sup>th</sup> day of April 2008.

**George Dulu**

**Judge**

**In the presence of –**

Mr. C.N. Kihara for the applicant

Mr. Mwangi – court clerk