



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 404 of 2008

CHRISTOPHER MUGO NJIRU & ANOTHER.....APPLICANT

Versus

HON. UHURU KENYATTA & 4 OTHERS.....RESPONDENT

RULING

The ex parte Applicants, Christopher Mugo Njiri t/a Mugo Scrap Merchants and Roma Scrap Metal Dealers Ltd. seek leave of this court to commence Judicial Review Proceedings against the Hon. Uhuru Kenyatta, Minister for Trade, Ministry of Trade, Ministry of Energy and The Commissioner of Customs and Excise Duty, the 1st – 5th Respondents, and the Kenya Power & Lighting Co. Ltd. and Telecom Kenya Ltd are named as Interested Parties.

The Applicants seek leave of this court to apply for an order of prohibition stopping or prohibiting the 1st and 2nd Respondents or any other person from banning and/or causing to be gazetted the ban of the importation and exportation of scrap metals and secondly leave to apply for an order of certiorari to bring into this court and quash the decision of the 1st and 2nd Respondents from whatsoever appearing in the Kenya Gazette or otherwise, banning the importation and exportation of scrap metals. It is also prayed that if leave is granted, the same do operate as stay.

The Chamber Summons is based on the Statutory Statement dated 4th July 2008 and the verifying affidavits of Irshad Sumra the Managing Director of the 2nd Applicant dated 30th June 2006 and that of the 1st Applicant dated the same date and a further affidavit by Irshad Sumra dated 9th October 2008.

The application was opposed, grounds of opposition were filed on 30th July 2008 on behalf of the 1st and 3rd Respondents, Pauline Jepkangor Kipkulei a Revenue Officer swore an affidavit dated 3rd October 2008 on behalf of the 5th Respondent, the 1st Interested Party filed grounds of opposition on 29th July 2008 whereas Lucy Barno, a legal officer with the 2nd Interested Party swore an affidavit dated 29th July 2008.

The Applicants are scrap metal dealers and are aggrieved by the decision of the 1st Respondent to ban importation and exportation of scrap metals contained in Gazette supplement No. 50 of 30th June 2008 Legal Notice 94 dated 30th June 2008. The 1st Applicant deponed that he learnt of the ban through the print media and annexed copies of the newspapers as Exhibit 11 1 (a) (b) & (c). That the ban is aimed at

stopping theft and vandalization of the Interested Parties' properties, transformers and conductors. That the ban is general and does not indicate whether it only relates to the Interested Party's scrap metals alone or not and that efforts to get the Minister to clarify have been fruitless. The Applicants contend that they do not trade in the Interested Party's scrap metals and upon importation, the scrap metal is verified by police and that the Applicants have already entered into contracts with international companies for purposes of supply of scrap metals and they stand to suffer prejudice if the ban is not lifted. The 2nd Applicant annexed a copy of such contract IS-3 while the 1st applicant annexed one as CMM 1. They allege that the 1st Respondents decision is arbitrary, unjust, capricious, unfair, an abuse of power, discriminatory and that they will suffer loss, their businesses will come to a halt and many will be rendered jobless as a result of the ban.

Mr. Omondi who urged the application on behalf of the Attorney General submitted that the Application is incompetent, misconceived, an abuse of the court process and offends the doctrine of separation of powers. That there is no decision that is sought to be quashed. That the application does not describe what decision is to be quashed for the court to know what to quash. That in any event the Applicants are challenging the merits of the decision but not the decision making process, that the decision is already in force and there is nothing to stay. Mr. Omondi also contended that the Applicant did not seek to amend the statement but instead has purported to introduce the decision of the Minister in the further affidavit when such decision is not specified in the statement or Chamber Summons. He also urged that the Applicants seek to challenge an allegation that the Respondent's decision gives unfair advantage to the Interested Parties which is really the merits of the decision and that in any event the decision is already in force and there is nothing to stay.

Mr. Ado, Counsel for the 5th Respondent submitted that there is no specific allegation made against the 5th Respondent nor is there any order sought against the 5th Respondent and the 5th Respondent should be removed from proceedings.

Mr. Fraser, Counsel for the 1st Interested Party submitted that the format of the application is wrong for having sued irrelevant parties ie 1st, 3rd and 4th Respondents when only the office of the Minister for Trade should be the party. 2^{ndly} he argued that there is no evidence of any decision to be quashed, and the application is therefore fatally defective. That the further affidavit of the 2nd Applicant seeks to exhibit Legal Notice 94/08 yet it is not part of the original application and one would have expected an amendment of the application. Mr. Fraser also brought to the attention of the court that the Legal Notice is brought under the Import and Export and Essential supplies Act Cap 502 which was repealed by S. 114 of the Licensing Laws (Repeals and Amendments) Act which was brought into force by Legal Notice 53 of 2007 and that therefore, Legal Notice 94/08 is made under legislation that is repealed and is therefore of no effect.

The 2nd Interested Party also opposed the Chamber Summons on grounds that the verifying affidavit sworn on 3rd June 2008 purports to verify a statement that was not in existence as at the date it was sworn. Mr. Ciuri, Counsel for the 2nd Interested Party also submitted that the Applicants have concealed material facts and have come to court with unclean hands. He urged that for one to deal in scrap metal, the Scrap Metal Act Cap 503 S. 3, requires that one be issued with a licence and that the Applicants have not exhibited any licences. That S.6 of the said Act provides for specific licences that are issued and the Applicants have not exhibited what type of licence they were issued with. That Rule 7 of the scrap metal Rules provides for a prescribed form of keeping records and no such record has been availed to the court.

In reply to the allegation of non disclosure, Mr. Masika argued that it is the Minister who is guilty of non disclosure of material facts and that the further affidavit was filed with leave of the court so that they could introduce the Legal Notice. That they were not aware of the repealed Act and that the Legal Notice has taken effect despite the repealed Act and the same should be quashed.

After considering the Chamber Summons before me I am satisfied that the same is incompetent and fatally defective. At prayer C, the Applicant refers to an anticipated decision to ban or cause to be

gazetted the ban of importation and exportation of scrap metals. Prayer (d) also refers to a decision 'whether appearing in the gazette or otherwise' being quashed. In Judicial Review the decision sought to be quashed should be specifically pleaded in the prayers both in the statement and the Chamber Summons/Notice of Motion.

In the further affidavit the, Applicant purports to exhibit Legal Notice 94 of 2008 made on 16th June 2008 and gazetted on 30th June 2008. The Chamber Summons was filed on 8th July 2008 when the gazette notice had already been issued and the prayers in the statement and Chamber Summons should have been specific and in tandem with the gazette notice as required. Instead of filing a further affidavit annexing the impugned decision, the Applicant should have amended the statement to include the prayer to quash or prohibit the Respondents in respect of the decision of 16th June 2008. As properly submitted by the Respondents and the Interested Parties, there is no decision sought to be quashed or prohibited pleaded in the Chamber Summons and statement, upon what the court can exercise its discretion to grant leave to commence Judicial Review proceedings.

I also do agree with the 1st Interested Party that it was not necessary for the Applicant to enjoin 1st Respondent, 3rd Respondent and 4th Respondent to these proceedings. It was sufficient to file suit against the Minister for Trade but not the Minister in his personal capacity. The three, 1st, 3rd and 4th are wrongly enjoined and are hereby struck out of the suit. The 5th Respondent should have been enjoined as an Interested Party.

The Applicants were said to have failed to disclose material facts for example, that they are issued with licenses to trade in specified kinds of scrap metal. It is after that challenge that the 2nd Respondent filed a further affidavit annexing a letter dated 7th January 2008 from the office of the President allowing the 2nd Applicant to transport scrap metals except Telkom (K) cables from all over the country to Mombasa, between 7th January 2008 to 31st June 2008. It is issued by the Provincial Police Officer Coast Province. However the 1st Applicant has not exhibited any licence and this court would not be in position to tell whether or not the 1st Applicant is licensed in the import or export of any kind of scrap metal.

Mr. Fraser disclosed to this court that in fact the legal notice which was supposed to be challenged is issued under a repealed Act. At Legal Notice 53 of 16th April 2007, the licensing (Repeals & Amendment) Act 2006 came into operation. Under S. 114 thereof, the Import, Exports and Essentials supplies Act was repealed. Though it was repealed the Minister of Trade purported to issue Legal Notice 94 of 16th June 2008 pursuant to that repealed Act. The Minister's decision is therefore null and void ab initio. In this application the legality of the decision of the Minister for being based on a repealed law is not questioned. The grounds upon which the Applicant was challenging the Minister's decision was that it was unreasonable, unjust, made in bad faith. In Judicial Review the grounds upon which an application is premised are found in the statement and no where else. (Order 53 Rule 4 (1) Civil Procedure Rules). There is no basis for grant of leave to the Applicant based on above reasons and the Chamber Summons dated 4th July 2008 is hereby struck out with the Applicants bearing the costs.

Dated and delivered this 30th day of October 2008.

R.P.V. WENDOH

JUDGE

Mr. Fraser for 1st Interested Party

Mr. Ngugi for 2nd Interested Party

Mr. Masika for the applicant

Mr. Lekarai holding brief for Matuku for 4th Respondent

Daniel: Court Clerk