



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Civ Appli 606 of 2005

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

ORDERS UNDER ORDER LIII CIVIL PROCEDURE

RULES

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE KENYA PORTS AUTHORITY ACT CAP 391

LAWS OF KENYA

AND

IN THE MATTER OF: THE EAST AFRICAN HARBOURS REGULATIONS

1970

AND

IN THE MATTER OF: THE NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY ACT 1999

AND

REPUBLICAPPLICANT

AND

THE KENYA PORTS AUTHORITYRESPONDENT

KABURU & SONS SHIP CONTRACTORS

MWAWAKO SHIPPING AGENCIES EX-PARTE APPLICANTS

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY...INTERESTED PARTY

SECOND INTERESTED PARTYSUBIRA SHIP CONTRACTORS

RULING

By a letter dated 8th July 2005, Kenya Ports Authority, the Respondent herein, informed Kaburu & Sons Ship Contractors and Mwawako Shipping Agencies the applicants herein, of the cancellation of their licences giving them a right to carry out sludge and waste disposal at the port of Mombasa.

Being aggrieved by that decision the applicants filed judicial review proceedings in which they now seek for orders of certiorari to quash the Respondent's decision and a further order of prohibition to prohibit the Respondent from further proceeding with implementing, enforcing and or causing it to be enforced or implementing the purported cancellation of the licenses.

When the motion came up for hearing, the Respondent raised a Preliminary Objection against the whole Motion. It is the argument of Miss Malik, advocate for the Respondent that Kenya Ports Authority exercised its powers donated to it by Kenya Ports Authority Act and under the East African Harbours Regulations of 1970 to cancel the licenses given to the applicants. It further argued that the discretion was absolute and this court has no discretion to interfere with the decision on the ground as whether or not the decision was fair. Mrs. Malik also argued that the decision to cancel the licence has been made and hence there is nothing to stay. It was her view that the motion should have been filed before the 8th day of July 2006.

On his part, Mr. Kibara Advocate for the applicants was of the view that the motion is competently before this court and that this court has the jurisdiction to interfere with the decision of the Respondent. The Applicants' advocate was of the view that the issues raised in the notice of preliminary objection can only be disposed of in a substantive application. It was pointed out that the applicants are likely to show that the Respondent in exercising its statutory powers it was biased and that it did not accord the applicants a right of hearing.

I have taken into account the competing arguments for and against the preliminary objection. My understanding of the Preliminary Objection is that it is basically challenging the jurisdiction of the court to determine the dispute. It is the argument of Mrs. Malik that the dispute set out in these proceedings is not amenable by Judicial Review. It is not denied that the Respondent cancelled the applicants' licences in exercise of a statutory power specified under the Kenya Ports Authority Act and the East African Harbours Regulations of 1970. There is no dispute also that the power is discretionary. This court has been urged to hold discretionary powers are not amenable to judicial review. There are ample authorities on the subject. The crux of the matter is that the Respondent's decision is an administrative decision, which is amenable to judicial review. The applicants are not barred from coming to this court for assistance. Let me refer and adopt what Lord Esher M.R. said in the English case of **Regina =vs= Vestry of Pancras [1890] 24 Q.B.D. 371 at pages 375-376** in which he said of a body who were entrusted with a discretion:

“They must fairly consider the application and exercise their discretion on it fairly and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.”

Lord Greene M.R. was more emphatic in Associated Provincial Picture Houses Ltd. =vs= Wednesday Corporation [1948] 1 KB 223 in which he said:

“ a person entrusted with a discretion must so to speak direct himself properly in law. He must call his own attention to the matters, which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.”

The final decision is that the preliminary objection has no merit. It is dismissed with costs to the applicant.

Dated and delivered at Mombasa this 2nd day of June 2006.

J.K. SERGON

J U D G E

In open court in the absence of the parties.