



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

Misc Appli 1473 of 2005

JOHN NDUNGU WAWERU.....PLAINTIFF

Versus

THE DISTRICT VETERINARY OFFICE MARAGUA & ANOTHER.....DEFENDANT

JUDGMENT

The Notice of Motion dated 25th October 2005 is brought pursuant to Order 53 Civil Procedure Rules. The applicant, John Ndungu Waweru seeks orders of Judicial Review against the District Veterinary Officer Maragua and the Director of Veterinary Services, the 1st and 2nd respondent. The applicant seeks the following orders:-

1. That the court do issue an order of prohibition directed at the Director of Veterinary Services preventing him from issuing a slaughter house licence to one Harrison Wakinga Kamau to operate a slaughter house in Kabati Market, Maragua District in its current location.
2. That the court do issue an order of certiorari to remove to this court for the purpose of quashing the decision of the District Veterinary Officer Maragua District approving the construction of a new slaughter house at Kabati Market, Maragua District.
3. He asks for costs.

The application is supported by a statutory statement, a verifying affidavit of John Ndungu, the applicant and a further affidavit dated 27th February 2006.

Dr. Jacob Miaron the Permanent Secretary, Ministry of Livestock filed a replying affidavit dated 17th March 2006.

Harrison Wakinga Kamau the Interested Party, had filed an affidavit dated 24th November 2006 which was filed in support of an application dated 24th November 2004 which sought to set aside the orders of stay. The applicants and Interested Party also filed skeleton arguments.

The applicant was represented by Mr. Muriuki, the respondent by Mr. Mwaniki and the Interested Party by Mr. Macharia.

Before I go to consider the usual arguments, I think it proper to state what I understand the background of this dispute to be.

The applicant is the owner of a slaughter house at Kabati Market. He was asked to relocate the slaughter house by the District Veterinary Officer in the year 2000 because the slaughter house had been surrounded by residential homes. The slaughter house business had been owned by both his father and the Interested Party's father but it now belonged solely to him. The applicant obliged and by May 2004, he had commenced operation of his new slaughter house. In April 2005 the applicant learnt that the Interested Party had asked the District Veterinary Officer to allow him construct a slaughter house in Kabati Township which was to be put up in the vicinity that the applicant had been made to relocate from. It is the applicants contention that the decision by the District Veterinary Officer was unreasonable and contradictory, that he considered irrelevant matters, the decision was made in bad faith and was therefore unfair and was made in excess of the officers discretion.

In the grounds contained in the statutory statement, the applicant contends that the decision was made in bad faith and was an abuse of the court process.

In his brief submissions, Mr. Mwaniki submitted that the order of prohibition cannot issue because the licence has already been issued vide a letter dated 26th October 2005 from Eng. David Stower who is the Permanent Secretary Ministry of Livestock.

As regards the prayer for certiorari, he submitted that it cannot be issued because the applicant seeks to quash the decision of the District Veterinary Officer but that officer did not make any decision. It is the Permanent Secretary who made a decision to let the Interested Party construct a slaughter house and there is no prayer to quash the decision of the Permanent Secretary.

He also submitted that this is actually a trade dispute disguised as a Judicial Review application as there is no evidence of bad faith on the part of the District Veterinary Officer because the licence for a slaughter house can be granted once one has complied with conditions set out in the Act.

Mr. Macharia on behalf of the Interested Party made lengthy and elaborate submissions. His contention is that the grounds contained in the statutory statement are the only ones the court should consider, that is, that the approval of another slaughter house is done in bad faith, an abuse of court's discretion and the decision to have the slaughter house relocated was made irrationally. Mr. Macharia contends that the applicant purported to argue two other grounds that the decision is illegal and arbitrary which is irregular.

Mr. Macharia also submitted that the applicant did not disclose all the facts to the court as he alleged that the new slaughter house is being constructed 100 yards from his old one and yet the condemned slab and the Interested Party's slab are 1 km north of Kabati whereas the applicant's is 2 km west of Kabati town.

The applicant is also said to have misrepresented facts to the court in that he did not tell court the true relationship between the applicant's father and Interested Party's father over the slaughter house as the two were partners in the business. It is the Interested Party's contention that the non disclosure of material facts is aimed at concealing the real dispute before court, that it is a private dispute which does not fall under the purview of Judicial Review. Mr. Macharia also submitted that the applicant did not comply with Order 53 R 7(1) in that the order or decision sought to be quashed was never exhibited. Further to the above, it is his contention that under Rule 6 of Regulations made under the Meat Act, the Director of Veterinary Services can only give directions and instructions and there is no evidence that he directed the District Veterinary Officer to do anything, and Director had no authority to issue a licence under that Regulation and the applicant should have sought an order of mandamus to close the slaughter house.

As to the order of certiorari, it was submitted that the applicant came to court with an improper motive arising out of business rivalry and wants the slaughter house shut down. Counsel relied on the case of **R V COMMISSIONER OF CUSTOMS AND EXCISE ex parte COOK & STEVENSON 1970 ALL ER 1068** where some Bookmakers who had paid their taxes as required challenged a decision to allow others to pay differently by way of instalments alleging that the decision was for being arbitrary and

irrational and the court held that the intention of the applicants was an ulterior motive to put others out of business and applicants did not have sufficient interest in the matter. Counsel also cited the case of **INLAND REVENUE COMMISSIONER V NATIONAL FEDERATION OF EMPLOYED AND SMALL BUSINESS LTD (1981 WLR) 722** where applicants moved to court seeking mandamus alleging different taxation and court held that they did not have sufficient interest to investigate the tax affairs of another tax payer or complain that one was under assessed and therefore the applicant cannot question why the licence was granted. Counsel also relied on the case of **KENYA FARM NUT CO-OPERATIVE SOCIETY LTD V HORTICULTURAL CROPS DEVELOPMENT AUTHORITY HC 83/1993** where the court considered when to grant a licence and court said that the right to a licence is God given unless legislation restricts that right in the public interest.

I have now considered the rival arguments of the parties and though the parties never raised this issue; the court on its motion finds it imperative that it be considered. I do find that the Notice of Motion dated 25th October 2006 is not properly before this court because the Republic has not been made the applicant in this case. In the Notice of Motion, John Ndungu Waweru is indicated as the applicant, then we have the two respondents, the District Veterinary Officer Maragua and Director of Veterinary Services and the Interested Party is Harrison Wakinga Kamau. In the case of **FARMERS BUS SERVICE & OTHERS V THE TRANSPORT LICENSING APPEAL TRIBUNAL 1959 EA 779** the East African Court of Appeal held that the prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled. On 12th December 1964 upon Kenya's assumption of a Republican status, the place of the crown was taken over by the Republic and orders of certiorari, prohibition and mandamus are made in the name of the Republic. The orders are issued in the name of the Republic to ensure that public authorities and tribunals treat the individuals whom they deal with fairly, stick to the law and powers conferred upon them. The Republic has put in place a system/mechanism of checking itself and its officer's excesses. Justice Ringera in the case of **JOTHAM MULATI WELAMODI VS. THE CHAIRMAN – ELECTORAL COMMISSION OF KENYA MISC. APPLICATION 81 OF 2002**, considered the **FARMERS CASE** and held that the decision in the **FARMERS BUS CASE** set the format in which to bring Judicial Review applications by way of Notice of Motion and he revisited the format of the substantive motion under Order 53 Civil Procedure Rules.

In this case, the Republic should be the applicant, the District Veterinary Officer and Director of Veterinary Services the Respondents, Harisson Wakinga Kamau the Interested Party, and John Ndungu Waweru should be the ex parte applicant. In the **WELAMODI CASE** and the case of **THE CHAIRPERSON OF NATIONAL GOVERNING COUNCIL OF AFRICAN PEER REVIEW MECHANISM & NATIONAL COUNCIL NON GOVERNMENTAL ORGANISATIONS VS. HON. MINISTER PROF. ANYANG NYONGO – MISC. APPLICATION NO. 1124 OF 2005**, the courts held that if the substantive motion is not brought in the name of the Republic, the defect is fatal. So even before I go on to delve into the merits of the arguments of counsels, I do declare that the Notice of Motion dated 28th October 2005 is fatally defective and the orders cannot be granted.

Did the applicant comply with Order 53 Rule 7(1) Civil Procedure Rules.

That rule reads as follows:-

“In the case of an application for an order of certiorari to remove any proceedings for the purpose of them being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion, he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court.”

A reading of the above provision indicates that it is mandatory to lodge the decision sought to be quashed. I believe the reason behind it is that the Court should know whether the order does exist, its nature and contents and avoid acting in vain or giving an order that may end up being contradictory and an embarrassment to the Court.

In the case of **SAMSON KIREREA M'RUCHU VS. MINISTER FOR LAND & SETTLEMENT CA 21 OF 1999** the Court of Appeal held that compliance with Order 53 rule 7(1) Civil Procedure Rules is a precondition to seeking an order of certiorari and an applicant who fails to comply with the request of the provision disentitles himself to a hearing of his motion. The Court of Appeal further observed that failure to comply with the rule does not necessarily render the application incompetent ab initio but renders the proceedings continued in violation thereof, a nullity. The applicant did not annex the decision of the District Veterinary Officer Maragua which he seeks to have quashed. The applicant never offered any explanation as to why he did not annex the said decision. It is no wonder that the applicant did not even state in the Notice of Motion when the said decision was made. An order of certiorari could only have been available if the application was made within 6 months of the decision.

The applicant did not specifically state when the said decision was made, was it within 6 months of the making of the decision and the filing of this application? I find that the failure to lodge the decision of the District Veterinary officer renders this application a nullity and even if it was not, it is unlikely that the order would issue if the court did not know when the decision was made.

It is true that the applicant had indicated that the grounds upon which the application was brought were that the approvals of construction of the new slaughter house at Kabati Market was done in bad faith and amounted to abuse of discretion and 2ndly that the decision to have the applicant relocate his slaughter house was not rationally connected to the purpose for which it was taken. The Interested party objected to the applicant including new grounds in the Notice of Motion. I do agree that the applicant cannot rely on the grounds now included in the Notice of Motion. In any event, in Judicial Review there is no provision that grounds upon which the application is premised should be in the body of the application. Order 53 R 1(2) specifically provides that the grounds will be found in the statutory statement. The court can therefore only look at the grounds in the statutory statement and ignore those included in the body of the Notice of Motion.

The proper procedure for the applicant to adopt to introduce fresh grounds to the application would have been as stated in the case of **R V BOW STREET** stipendiary magistrates, ex parte **ROBERTS & ANOTHER (1990) 3 ALL ER 487** – when

“an applicant for Judicial Review who wished to rely on the substantive hearing of the application on grounds other than those for which leave was granted did not need to renew to application for the purpose of obtaining leave in respect of those other grounds but instead had to give notice to the respondent that he intended to rely on other grounds at the substantive hearing. The respondent could then file an affidavit on which he wished to reply. And it followed that since the defendants did not need leave in respect of the grounds on which they had been refused, then the application would be dismissed.

Such an amendment is provided for under order 53 Rule 4 (2) where one can amend a statement if new matters have arisen from the affidavits filed in reply.

Accordingly the court will have no regard for the grounds introduced in the Notice of Motion.

Was the decision to relocate the applicant's slaughter house and permit the Interested Party to construct a slaughter house made in bad faith and unfair? The applicants key contention is that the decision to allow the construction of a slaughter house near a residential area, which reason had been used to have the applicant relocate his slaughterhouse, was made in bad faith and was unfair. The applicant also takes issue with the fact that even before any approval for construction was made, the Interested Party had started construction. The Permanent Secretary, in his affidavit in reply disagreed with the applicant's averments and supports the Interested Party that in fact, the Interested Party applied to be allowed to construct a slaughterhouse and was advised to seek the relevant permission from the relevant statutory bodies, namely NEMA, the Permanent Secretary Ministry of Livestock and Fisheries and approvals of plans by the Director of Veterinary Services. It is denied that the Interested Party ever started construction of a new slaughter house before all approvals were given.

The NEMA report and authorization from the Permanent Secretary were exhibited. The Permanent Secretary also states that the applicant has misrepresented to the court the distance of the Interested Party's slaughterhouse to the residential area. He deposed that the Interested Party's slaughterhouse is 1 km to the North of Kabati town whereas the applicants slaughterhouse is 2 km to the West of the town. It is the Permanent Secretary's mandate to approve construction of slaughterhouses if all legal and Health requirements are met and the Interested Party did meet all these.

The Interested Party having complied with all the requirements for approval of a slaughterhouse, this would not attribute any bad faith to the Permanent Secretary or any of the other officers concerned with the application.

As regards the issue of the Interested Party's slaughterhouse being built next to a residential area where the applicants had been made to relocate from, whereas the applicant said generally that the Interested Party's slaughterhouse was next to a residential area without stating the distance, the Permanent Secretary specifically stated that the Interested Party's slaughterhouse is about 1100 yards (or 1 km) North of Kabati town.

Having considered evidence of both the Interested Party and applicant, I do not find any apparent bad faith or unfairness proved as against the relevant bodies that were involved in the approval of the slaughter house licence to the Interested Party. The said bodies had a discretion to consider the applicant's application and they did just that.

In any event, is it the District Veterinary Officer who was charged with the responsibility of issuing licences for approval of constructions of slaughterhouses? As considered earlier in this ruling the decision of the Director of Veterinary Services which is sought to be quashed was not annexed.

The Permanent Secretary Ministry of Livestock in his replying affidavit of 17th March 2006 depones that it is within his jurisdiction to grant approval. Indeed it is the Permanent Secretary, Engineer David Stower who wrote a letter of approval to the Interested Party. It is dated 26th October 2005 Exhibited at HWK 24. Under R 6 of the Regulations made under the Meat Act, the Director of Veterinary Services merely gives directions on enforcement of the Regulations or orders closure of the slaughterhouses for non compliance with Regulations. The decision of the Permanent Secretary is not sought to be quashed by certiorari. The prayer sought is in my view misplaced. The Director of Veterinary Services did not issue any licence nor did he approve any that can be quashed.

Does the applicant have any locus standi to bring this application? Judicial Review is a public law remedy and available to one who seeks to enforce a public law right. It seems the applicants application is not brought in good faith.

The applicant has veiled his personal interests in a public law remedy of Judicial Review which is not available to enforce as a private right. The applicants application seem to have been motivated by ulterior motives which amounts to an abuse of the court process and would disentitle him to any remedy. The case of **EX PARTE COOK & STEVENSON** (supra) where two bookmakers who had complied with the terms and provisions of the finance. Act requiring Book makers to pay annual licences challenged the decision which was later made allowing other Book makers to pay for the licences by monthly installments because they had paid for the full licence at one go. The court held that their only interests or motive was ulterior in putting their competitors out of business and the application failed. In this case what the applicant wants is to ensure that the Interested Party does not put up a slaughter house which is a similar business to his in Kabati area. His application must fail on account of being actuated by ulterior motives.

The applicant has also sought an order of prohibition directed at the Director of Veterinary Services to prevent him from issuing a slaughter House licence to the Interested Party.

What is the scope of an order of prohibition. Halburys, Laws of England 4th Ed, Vol 5 pg 37 para 128 states.

“It is an order from the High Court directed at an inferior tribunal or body which forbids the tribunal or body to continue proceedings therein in excess of courts jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or a wrong decision on the merits of the proceedings.”

Applying the principles in this case, first of all the Director of Veterinary Services whom the order is supposed to be issued against is not the licensing or approving officer. That prayer is once again misplaced.

In addition, by his letter dated 26th October 2005 the Permanent Secretary had already granted the permission to the Interested Party to proceed with construction of the slaughter house. The plaintiff having already acted, the prayer for an order of prohibition comes late in the day and would therefore not have been available to the applicant

In sum I do find that even if the application had not been fatally defective, the application was not merited and would have failed anyway.

The applicants application dated 25th October 2005 is hereby struck out with costs to the respondent and Interested Party.

Dated and delivered this 6th day of July, 2006.

R.P.V. WENDO

JUDGE