REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE
Misc Civ Appli 1 of 2004

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR

ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION
IN THE MATTER OF: THE CONSTITUTION OF KENYA

IN THE MATTER OF: STATE CORPORATIONS ACT CHAPTER 446 LAWS OF KENYA
AND

IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA
AND

IN THE MATTER OF THE GOVERNMENT'S DECISION OF 17TH DECEMBER, 2003 TO APPOINT NEW DIRECTORS AND MANAGERS OF KENYA SEED

COMPANY LIMITED
AND

IN THE MATTER BETWEEN:

REPUBLIC……..……APPLICANT

VERSUS

1. THE ATTORNEY GENERAL……....…….1ST RESPONDENT

2. THE MINISTER OF AGRICULTURE

HON. KIPRUTO ARAP KIRWA…….....…….2ND RESPONDENT

AND

1. PATRICK WANDABWA)

2. OBONGO NYACHAE)

3. LEOPOLD MUREITHI)

4. PETER MBOYA)

5. BENJAMIN BETT)

6. REUBEN OLEMBO)…….…….INTERESTED PARTIES

7. THE AGRICULTURAL

DEVELOPMENT CORPORATION)

8. KENYA FARMERS ASSOCIATION)

9. FRANCIS OYATSI)

10. SIMON NGULI)

11. JOSEPH OMOKAMBA)

12. NICHOLAS KIRITU)

13. HOSEA KIPKEMBOI SITIENEI)

14. ROSE CHAURI)

EX-PARTE

1. KENYA SEED COMPANY LTD

2. NATHANIEL K. TUM

3. ZAKAYO CHERUIYOT

4. GEORGE CHERUIYOT

5. NELSON KIRIOR

6. FRED WAFULA

RULING

Kenya Seed Company Ltd. was incorporated as a limited liability company under the Companies Act Cap. 486 of the Laws of Kenya on 2/7/1956 and its subscribers were private individuals. In 1960, it was converted to a Public Limited liability Company, but has never been quoted on the Nairobi Stock Exchange. The Agricultural Development Company, which is the 7th interested party, and which I shall hereinafter refer to as 'ADC', and which is wholly owned by the Government of Kenya ('GOK') acquired its first shares in Kenya Seed Company Ltd., in 1971, a portfolio which it build over the years, and as at 2001, its total holding was 5,700,720 shares, which translated to 52.88% of the total equity holding in KSC.

During the year 2002, Kenya Seed Company Ltd., (hereinafter referred to as 'KSC'), floated an extra number of shares, which were taken up by several private individuals, so that by December 2003, it had issued a total of 14,151,265 shares, 40% of which were held by ADC, while the balance of 60%, were jointly owned by other companies, including Kenya Farmers Association, which is the 8th interested party, and several individuals. I shall now refer to Kenya Farmers Association as 'KFA'.

On 18/12/2003, the Daily Nation newspaper carried out a report, whose major highlight was:

"State takes back seed firm

The ownership of the Kenya Seed Company was returned to the government yesterday in a move which immediately reversed a controversial takeover of the company by private individuals in the year 2000.

Until yesterday, the company was in the control of the private interests led by its long-serving Chief Executive, Mr. Nathaniel arap Tum."

It would appear that the action of GOK, which saw to the appointment of new board of directors of KSC, was precipitated by a transaction, which in its opinion had led to private individuals taking over the control of KSC, a company which it considers very strategic.

The new aforementioned new board of directors, which moved in and took over the management of the company as evidenced by a report that appeared in the Daily Nation edition of 24/12/2004, had been appointed vide Notice Nos. 8976/2003 and 3/2004, which had appeared in the Kenya Gazette Editions of 19/12/2003 and 2/1/2004 respectively, as follows:

"THE STATE CORPORATIONS ACT

(Cap. 446)

THE KENYA SEED COMPANY LIMITED

APPOINTMENT OF CHAIRMAN

IN EXERCISE of the powers conferred by Section 6 (1) (a) of the State Corporations Act, I, Mwai Kibaki, President and Commander-in- Chief of the Armed Forces of the Republic of Kenya, appoint-

PATRICK WANDABWA

to be the Chairman of the Kenya Seed Company Limited, for a term of three (3) years.

Dated the 17th December 2003.

MWAI KIBAKI,

President."

And

"THE STATE CORPORATIONS ACT (Cap.446)

THE KENYA SEED COMPANY LIMITED

APPOINTMENT OF DIRECTORS

IN EXERCISE of the powers conferred by section 6 (1) of the State Corporations Act, the Minister for Agriculture appoints-

Obongo Nyachae,

Leopold Mureithi (Prof.),

Peter Mboya, Benjamin Bett,

Reuben Olembo (Prof.),

Managing Director, Agricultural Development Corporation,

General Manager, Kenya Farmers Association,

Permanent Secretary, Ministry of Agriculture,

Permanent Secretary, Office of the President,

Permanent Secretary to the Treasury,

Hosea K. Sitienei – (Managing Director), to be members of the Board of the Kenya Seed Company Limited, for a period of three (3) years, with effect from 17th December, 2003.

Dated the 24th December 2003.

KIPRUTO ARAP KIRWA,

MINISTER FOR AGRICULTURE."

Being aggrieved by the aforementioned decision and subsequent action, KSC, Nathaniel K. Tum, Zakayo Cheruiyot, George Cheruiyot, Nelson Kirior, and Fred Wafula, moved the court on 31/12/2003, in an application for leave to commence proceedings for the prerogative orders of certiorari, prohibition and mandamus.

Thereafter, on 5/1/2004, the seven moved this court in an application in which they seek several orders:

The application is based on several grounds but mainly that, they were not made aware of the charges against them, that they were condemned unheard, which they contend was contrary to the principles of natural justice, that KSC is not a subsidiary of any other company, nor is it a State Corporation, that the Government of Kenya does not hold any shares in it, that ADC participated wholly in, and later benefited from the aforementioned floatation of shares, and that the Minister for Agriculture had neither the authority nor the jurisdiction to act in the manner that he did, and that in the circumstances, his actions amount to irregular malicious and dictatorial gross interference with private property.

The applicants who have also filed their Statement of Facts and several affidavits in verification, therefore now urge this court to find that the Minister's decisions, were not only made in total contravention of the law, but that they were also ultra vires.

The statement is dated 24/12/2003. Order LIII rule 1 (2) provides that an application for such leave *"shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.……"* an issue which was considered by the Court of Appeal in **Commissioner General Kenya Revenue Authority through Republic and Silvano Owaki (CA (Ksm) 45/2000)** and in which case, the court held that *" the facts relied on are required by rule to be in the verifying affidavit not in the statement"*.

I find that though the statement complies with the two initial requirements, the applicants have proceeded to set out all the facts pertaining to their whole case therein, which in my humble opinion is not acceptable as such facts as appearing in pars. 7 to 45 thereof, form evidence, and bearing in mind that viva voce evidence can not be adduced in this type of application, it is of utmost necessity that such evidentiary information be verified by affidavit. It was, in my mind, therefore wrong to include such facts in the statement, which accompanied the application, which I need not say, save for their contention that they were not given a hearing, renders such a statement otherwise worthless. Perhaps this would explain the requirement that the court is allowed to *"grant permission to a claimant to add additional grounds of claim to those for which the claimant was originally given permission"* **(Supreme Court Practice Rules Vol 1 [2003] par 54.15.1)**, which would readily apply to our situation. But no application was made to add additional grounds, which means that one has to fall back to the Statement and the verifying

affidavits, which formed part of the pleadings in the Chamber Summons, and this current application. I shall otherwise refer to the affidavits on record as *"it is the verifying affidavit which is of evidential value"* **Commissioner General Kenya Revenue Authority through Republic and Silvano Owaki (CA (Ksm) 45/2000).**

Having referred to Kenya Seed Company Ltd. as 'KSC', I will now refer to the other five applicants, as the 2nd to 6th applicants respectively.

It was Mr. Nyairo Jnr's. submission that the respondents appear to challenge the aforementioned floatation, as they contend firstly, that it was done in contravention of the State Corporations Act, and secondly that it was not supported by A.D.C, yet ADC was well represented at the meeting where the decision to float the said shares was carried unanimously, that all directors of KSC, most of who represented ADC's interests signed the prospectus of 30/5/2001, after which all shareholders of KSC were invited to subscribe to the shares, that the shareholding of ADC in KSC was not interfered with at all. It was therefore his submission, that ADC which had participated fully in the flotation of the said shares, would now be estopped from claiming that the whole exercise and all subsequent transactions were irregular, fraudulent and illegal, more so because, and despite KSC appreciating that the GOK, has never had or even owned shares in KSC, and also that ADC was not its majority shareholder, which therefore meant that the GOK's role in the matter was merely advisory, KSC had nevertheless consulted GOK over the said matter, to whom the proposal appeared acceptable in principle, and in addition thereto, it had consulted the Capital Markets Authority (CMA), which would, taking all matters into consideration, mean that KSC had complied with all the legal requirements.

In his opinion, the Minister's action was thus tantamount to nationalization.

I feel that it is important that I deal with several preliminary issues, at this stage, before I proceed further.

The first issue arises from the affidavit of Kipruto arap Kirwa the Minister for Agriculture, sworn on 21.1.2004, which, save for its paragraph 21, I have been urged to strike out, as in the applicants' contention the jurat stands on its own, in a separate page removed from the affidavit, which they feel renders it fatally defective. I have looked at the decision in **Winnie Wanjiku Macharia and others v Sammy Njuguna Kigotho and others HCCC 167/2001**, which the applicants' counsel relied on, and which I find quite persuasive and which I would have readily adopted, were the position the same here. In this particular instance, the jurat does not appear on its own, as it is preceded by paragraph 21 of the said affidavit. Both appear on the same page, and the jurat cannot be said to appear on its own. I therefore decline to uphold that line of objection.

The other preliminary point of objection related to a further affidavit by one Hosea Kipkemboi Sitienei, the current Managing Director of KSC, which this court is urged to strike out in its entirety, as in the applicants' contention, he had no connection whatsoever with KSC prior to 17.12.2003, and therefore any information which he depones upon, relating to the period prior thereto, would amount to hearsay, and in this connection, the applicants counsel pleaded Order XVIII rule 3 (1) of the Civil Procedure Rules (CPR), and the proviso thereto which in effect prohibit such depositions, unless leave of the court has been obtained, in matters which are not interlocutory in nature.

It was also the applicants' preliminary objection that the interested parties had lodged grounds of objection, which should be struck out, as they are not provided for under Order LIII of the CPR.

Admittedly the legal principle on the application of Order LIII aforementioned is now well settled and as laid down by the Court of Appeal, in **Commissioner of Lands vs. Kunste CA 234 of 1995**, as follows:

> *"in exercising the power to issue or not to an order of certiorari, the court is neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the Government Lands Act and also S. 13A of the Government Proceedings Act, ……..that S. 13A, above when read closely, its wording clearly shows that a suit within the meaning of the term 'Suit' in S. 2 of the Civil Procedure Act is envisaged"*.

I need not re-emphasize the fact that that principle will apply in application for the orders of prohibition and mandamus, which are the other two orders which are governed by Order LIII aforementioned.

It therefore, in my understanding means that, since Order LIII applies in a special manner, a party in these types of proceedings should not plead or seek to refer to the other provisions of the CPA.

As far as filing the grounds of objection are concerned, I can do no better than refer to rule 4 of Order LIII, which makes reference to, and only caters for the filing of only affidavits by the respondents. The fact that no reference is made to grounds of objection, can only mean that a party to an application of this nature, whose determination is to be based on evidence, which is required to be verified by affidavits, can not be allowed to file general grounds of objection, which cannot in any event be verified. I do therefore find that in the circumstances, I have no choice, but to uphold this particular line of objection, and I do strike out the grounds of objection filed by the interested parties.

While I appreciate that the matter before me is not interlocutory in nature as whatever decision I arrive at today, will determine the matter between this parties once and for all, but however, in view of my above finding, that applications of this nature are of a special nature, it goes without saying that Order XVIII would not equally apply herein, and in the circumstances, the aforementioned further affidavit of Sitienei, whose sources of information and belief are clearly spelt out in his affidavit, and in which he depones that he believes them to be true, and which are also backed by relevant documents, which again he depones came into his possession by virtue of his position as the Managing Director of KSC, is acceptable, and in the circumstances, I cannot therefore uphold that specific line of objection.

The application is however opposed by the respondents and the interested parties.

Though it is the applicants' contention that they obtained an order for leave to commence these proceedings, as well as on order for stay on 12.1.2004, the basis of the objection, is that not only is the application defective for lack of the relevant leave, but that it does not justify the granting of the orders now being sought. I will come back to those particular issues at a later stage.

The main issues arising from this application, are firstly whether or not KSC was a State Corporation, whether its actions pertaining to the floatation and later issue of the extra shares could be faulted, whether the action that was taken against it was proper and legal, whether these proceedings are properly before me, which would of essence require that I establish whether or not, this application is meritorious.

The State Corporations Act Cap 446 of the Laws of Kenya (hereinafter referred to as 'the Act'), was enacted in 1986 and revised in 1987.

It is common ground, that at that time ADC, which was a state corporation, had majority shares in KSC. This meant that KSC was a subsidiary of ADC by virtue of the fact ADC held more than 50% of the nominal value of its equity share capital, and the obvious interpretation would be that being a subsidiary of a state corporation, KSC was governed by the Act, and it therefore fell within the full ambit of the Act, for it is clearly stipulated that a **"state corporation"** under section 2 (c) of the Act includes *"a subsidiary of a state corporation"*.

It is common ground that ADC was established as a body corporate, and it would be required *"to comply with such general or special directions as the Minister may from time to time issue in the performance of its functions"* (section 3 of the ADC Act). In my opinion, that requirement is couched in mandatory terms, and having found that KSC was a subsidiary of ADC, therefore fell within the mandate of the Minister, and that it was required to comply with his special and general directives.

The Companies Act does not require a private company to submit its audited accounts to Parliament, indeed, it is only a company which is classified as a state corporation that is under an obligation to comply accordingly, which state corporation is also required to submit its quarterly reports, and annual budgets, and also to appear before the Public Investments Committee, to explain matters pertaining to it's affairs, something that would not be required of a firm which was not a state corporation. I find that KSC

therefore acknowledged that theirs was a State Corporation, and without creating a farce, acted in compliance with the particular statutory requirements as is required of all state corporations. It can therefore only be concluded that by it conduct, in word and deed, it acknowledged that it was a state corporation, a fact which is further supported by GOK's action in appointing the Chairman of KSC over the years, as well as other members of its Board by virtue of the provisions of section 6 of the Act, which provides for the composition and appointment of boards of state corporations. It is also clear from the pleadings herein that it's Managing Director (the 2nd ex-parte applicant) was a government appointee, and that he held his term at the GOK's pleasure. He was also required to obtain authority to travel out of the country.

Of interest is the fact that members acknowledged at several Board Meetings that it was necessary to seek GOK's authority before the floatation of the shares, and the privatization, especially because they acknowledged that KSC was considered to be strategic, and it was clear from the exhibits on record that it had not been listed amongst those which GOK intended to privatize.

I have taken into account the evidence which emanates from the affidavits on record, and I am convinced that the issue of new shares was deliberated upon, that the Permanent Secretary to the Treasury had given GOK's position on the proposed new shares, to KSC, that the Head of Public Service, had directed KSC to discuss the matter and to revert to him, but that KSC held an AGM, after which it issued its prospectus, and thereafter proceeded to float and issue the new shares. I have not found any satisfactory evidence to show that KSC actually reverted back to the Head of Public Service as advised, which can safely be described as an act in breach of the provisions of the Act.

In any event, I can only assume that KSC was misguided by the issue of its exemption from the provisions of the Act, but the fact the ADC would appear to have voted along with the other shareholders, cannot in itself give credence to the contentious transactions, as the parties appear to have acted in total ignorance of the relevant legal provisions which governed them at the material time, leading to undertaking illegal and void transactions. Such transactions could not be validated by the participation of ADC in any way. Ignorance of the legal requirements cannot be an excuse.

In the circumstances, the GOK and the Minister were entitled to take the action that they took and to appoint the new management to protect the interest of the Public, in a matter affecting KSC, which was considered a strategic company.

But I could be wrong in the above finding especially in view of the fact that KSC maintains that it had sought and obtained an exemption from the application of the Act as far back as December 1994, vide Legal Notice No. 495 of 14/ 12/ 94, which indicated that:

"THE STATE CORPORATIONS ACT

(Cap.446)

EXEMPTION

IN EXERCISE of the powers conferred by Section 2 of the State Corporations Act, I, Daniel Toroitich arap Moi, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, declare the following corporate body shall be exempted from the provisions of the Act:

KENYA SEED COMPANY LIMITED

Dated the 14th December 1994.

D. T. ARAP MOI,

PRESIDENT."

The respondents have taken issue with the 'exemption', which they feel should not be relied on as it was a nullity.

A glance at section 2 of the Act which is referred to in the above notice shows that it is the interpretation section of the Act. The section can only seek to define 'exemption' which in any event it has not. It can not be used as a base for an exemption or exemptions, for it does not grant the President or any other person the power to exempt. In my opinion, the said 'exemption' was a nullity, and of no legal consequence, and thus void ab initio.

Based on the above finding, it is clear that when the issue of the floatation was raised at the first time, KSC was a state corporation.

Having found that KSC was a state corporation it cannot be gainsaid that it had to comply with the mandatory provisions of the Act.

Admittedly and as very well put by Mr. Nyairo, the conduct of parties cannot change the law and it cannot amount to an estoppel in law, which is why I would not place a lot of reliance on who attended what board meetings and how they voted, for misconception in a party's mind not matter how many times or even how often cannot make right a matter which is legally wrong, and it was incumbent upon the Minister and GOK to take appropriate action to stop the illegal activities.

This now brings me to the issue of leave to commence these proceedings.

I am mandated with the responsibility of ensuring that all steps which are prerequisite to the filing of this application have been complied with. I proceed cautiously as I am very well aware that this court is not sitting on appeal of the orders that were issued prior hereto.

The applicants filed their relevant application on 31/12/2003, after which having realized that there was a mistake in the ex parte orders, the seven moved the court under section 99 of CPA on 12.1.2004 and the Honorable Judge corrected his earlier orders and granted them leave. It was therefore Mr. Nyairo's contention that the order of 12.1.2004 was still valid as it has not been vacated and set aside, and it was his submission that leave had been granted but that by an oversight, that though the judge had pronounced it in court, he had however failed to indicate the fact on the record, and that he had granted an order for stay in his second order, and therefore, he could only have stated so as a reference to the order for leave; that they had gone back to the judge under the subrule and requested him to correct the error, which he did on 12.1.2004.

I feel that before I proceed any further, it is important that I append the proceedings of 31/12/2003 and 12/1/2004, and the orders emanating there from.

When Mr. Nyairo first appeared in court on 31/12/2003, he made submissions to the effect that, *'The application before this court is a Chamber Summons brought under Order 53 rules 1, 2 and 3 of the Civil Procedure Rules. The application has been certified as urgent by the Deputy Registrar Kitale.*

Under Order 53 a notice has to be given a day earlier at the court. The notice was issued on 24.12.2003 upon the Deputy Registrar Kitale Court.

On 29.12.2003 this application was filed. There are 6 applicants and we represent all of them. The respondents are two, and there are 15 interested parties listed herein.

This is coming up ex-parte today for leave. It is supported by a statement which is signed by all the applicants. The six applications have each filed an affidavit in support of the applicant. There is also a verifying affidavit…….".

He then proceeded to pray for "orders of judicial review" as there was an error in the orders of 17th December 2003", after which the court ordered as follows: '

Orders:

1. Let orders of judicial in the nature of:- (a) An order of certiorari to remove into the court and quash the decision of the government announced on 17/12/2003 appointing new management, staff of Kenya Seed Company Limited;

(b) An order of prohibition to prohibit the contravention by the Government and the Minister of Agriculture of the provisions of the Companies Act, Memorandum and Articles of Association of Kenya Seed Company Limited and an abuse of state power and machinery;

(c) An order of prohibition to restrain the Government appointees from entering into the offices or assuming any responsibilities or in any way dealing with the affairs of the Kenya Seed Company Limited;

(d) An order of prohibition restraining the Government from stationing members of the Police Force in the premises of Kenya Seed Company for purposes of enforcement of the Government decision;

(e) An order of prohibition to prohibit the Government and the Minister of Agriculture from interfering with day-to-day operation and management of Kenya Seed Company Limited;

(f) An order of mandamus to compel the Government and the Minister of Agriculture and/or their agents, servants to observe the provisions of the Companies Act Cap 486 of the Laws of Kenya, thee Memorandum and Articles of Association of Kenya Seed Company Limited and to facilitate the operations of the Kenya Seed Company Limited on the way it has been done for the last 46 years.

2. Let the leave operate as a stay of enforcement of the Government's decision of 17th December, 2003 purporting to appoint new members of the board and the management of Kenya Seed Company Limited and maintenance of status quo as obtained prior to the 17th December, 2003 pending the hearing and determination of the substantive application of judicial review.……".

When the applicants appeared for the second time in court, which was on 12/1/2004, again in an ex parte application, their counsel Mr. Yano informed the court that *"there was an oversight in respect to the leave granted as it was not expressly indicated as such.……I have come under Section 99 and 100 of Civil Procedure Act where such a mistake can be corrected. I pray that leave be deemed to have been granted as from 31st December 2003"* after which the court issued the following order.

"Order:

The orders granted by me on 31st December 2003 are accordingly amended so that Order No. (1) therefore reads as follows:

1. "Leave is hereby granted to the Applicants to apply for orders of judicial review in the nature of ….…"

2. This Order is deemed to have been made on 31st December 2003 as at the time leave was granted".

Though the applicants' counsel urges me to find that the second order would apply in favour of his clients and he pleads section 99 of the CPA, I would however refer back to the point in this ruling where I dealt with the preliminary objections, and when I found that Order LIII of the CPR applies in a special manner, which would in effect mean that the powers granted under section 99 of the CPA would not have obtained at that particular instance, nor would they obtain in these particular circumstances and therefore, the correction of previous proceedings under section 99, would not lie as the provisions of CPA would not apply. In my humble opinion, the most appropriate action would have been for the applicants to withdraw

their application at that stage and to move the court in a fresh application.

Be that as it may, the applicants then proceeded to extract the order, whose validity has been questioned.

I have perused the order as extracted and it is clear that it was very different from that which was made by the learned judge, in that it does not expressly state the true record of the court. I have had to refer to **Commissioner General, Kenya Revenue Authority and Silvano Chema Owaki CA 45/2000** for guidance for where faced with a similar situation the Court of Appeal held that where an extracted order differs with the order of the court, the *"extracted order is a nullity and did not operate to stay the said seizure"*.

In my humble opinion, this is a court of record. It cannot suffice to say that parties would be required to rely on and therefore to extract orders which reflect the specific orders of the judge. It cannot therefore lie for Mr. Nyairo to state that the extracted order 'captured' the courts intentions. Both the order on record and the one which was extracted must be in strict conformity. That being the case then, I can only find that the extracted order in this particular instance is null and void and shall be of no comfort to the applicants, and that all matters conducted in pursuance to such an order are a nullity.

Having perused that said proceedings and the particular orders, I can do no more than refer to the relevant provisions of the law, and it cannot be gainsaid that obtaining that leave is a mandatory prerequisite to filing this type of application, for Order LIII rule 1 (1) of the Civil Procedure Rules requires that *"No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule"*, yet it is clear that by the time when they filed this application on 5/1/2004, they had no leave to do so. In my humble opinion, lack of such leave renders the whole application fatally and incurably defective, for the said leave cannot be obtained retrospectively after the substantive application has been filed by was of Notice of Motion.

But even if I am wrong in the above finding, and bearing in mind that they claim to have obtained the orders of stay and then the order for leave after the amendment, I am however bound by the legal principle that *"the court has no jurisdiction to split the hearing of prayers for leave and leave to operate as a stay ……..either the entire application was heard ex parte or is in its entirety adjourned to be heard inter partes"* (Shah v Resident **Magistrate, Nairobi [2000] 1 EA 208).** In any event, Order LIII rule 1 (4), is clear, in that it clearly stipulates that *"The grant for 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."* It is therefore a requirement that leave be in place before an order for stay is granted and in the circumstances and order for stay cannot be granted in the absence of leave.

But that was not all, as it appears that these applicants managed to obtain orders of judicial review, in an ex-parte application at the very first instance, which orders were final.

The above abnormalities thus renders the application void ab initio, and one which I would have no jurisdiction to entertain, which would therefore mean that the issue of whether the interested parties, whose appointment were properly made, were in office by the 31/12/2003 is neither here nor there as there was no proper or valid application in place by that date.

But in the event that I am wrong, would this application be meritorious?

The applicants seek the orders of certiorari, prohibition and mandamus.

The three orders were examined exhaustively in **Kenya National Examinations Council Ex-parte G. G. Njoroge and others CA No. 266 of 1996,** where the Court of Appeal laid down the legal positions as follows:

> *"An Order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or*

in contravention of the laws of the land. It lies, not only for excess of 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 procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…….. it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. <u>However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. It is clear that "once an order has been passed, it can not be quashed either in an appeal or by an order of certiorari….. an order of prohibition is powerless against a decision which has already been made before such an order is issued.</u>

<u>Such an order can only prevent the making of a decision</u>".

(underlining mine)

On the issue of an order of mandamus, the learned judges relied on Halsbury's Laws of England 4th Edn., Vol. 1 at page 111 from paragraph 89 and quoted as follows:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mod of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way." ("the mandate" at paragraph 90 thereof)

The court went further to state that *"an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed" ,* and if satisfied, the High Court would be *"compelling, through the remedy of mandamus. The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence. The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence"*

It was also the holding of the Court of Appeal that *"only an order of <u>CERTIORARI</u> can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons".*

These applicants seek the following orders inter alia:

I. An order of certiorari to remove into the court and quash the decision of the government announced on 17/12/2003 appointing new management, staff of KSC;

II. An order of prohibition to prohibit the contravention by the Government and the Minister of

Agriculture of the provisions of the Companies Act, Memorandum and Articles of Association of KSC and an abuse of state power and machinery;

III. An order of prohibition to prohibit the Government appointees from entering into the offices or assuming any responsibilities or in any way dealing with the affairs of the KSC;

IV. An order of prohibition to prohibit the Government from stationing members of the Police Force in the premises of KSC for purposes of enforcement of the Government decision;

V. An order of prohibition to prohibit the Government and the Minister of Agriculture from interfering with day-to-day operations and management of KSC;

VI. An order of mandamus to compel the Government and the Minister of Agriculture and/or their agents, servants to observe the provisions of the Companies Act Cap 486 of the Laws of Kenya, the Memorandum and Articles of Association of KSC and to facilitate the operations of the KSC on the way it has been done for the last 46 years.

It was the submission of Miss Kimani, the learned Chief Litigation Counsel, that circumstances in this case were such that it would have been impractical to afford the applicants a hearing, and that once a justification is established for not according audience, the order of certiorari cannot issue, and also, that where disclosure would be contrary to public interest, or where circumstances are so peculiar that compliance with rules of natural justice would be inconsistent with the paramount need of taking urgent remedial or preventive action, or where it is impractical to give notice and an opportunity to be heard. She relied on Halsbury's Laws 4th Ed. Vol. 1 at par. 74, page 90 where it is provided that:

"Audi alteram partem. The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act judicially in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of a discretionary decision on the interests of an individual may suffice in itself to attract an implied duty to comply with this rule……..

As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interest or expectations.

In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons; or where it is impracticable to give prior notice or an opportunity to be heard; ……."

I have taken the submissions of all very able counsel into account, in my humble opinion, I cannot ignore the circumstances that were prevailing at the time when the orders which are the subject of this application were made, in that the matter revolving a strategic company, one which GOK had never intended to privatize, had fallen into the hands of private individuals in an illegal manner, which action was being investigated by Kenya Anti Corruption Authority, and later precipitated to the charging of the 2nd and 3rd applicants with criminal offences. It would be understandable for a Minister to take urgent remedial measures, and in the circumstances, the Minister could act without complying with the rules of natural justice. In the circumstances, their first prayer cannot lie. In my mind there recourse lies in a claim for compensation.

The also seek an order of mandamus to compel the Government and the Minister of Agriculture and/or

their agents, servants to observe the provisions of the Companies Act Cap 486 of the Laws of Kenya, the Memorandum and Articles of Association of KSC and to facilitate the operations of the KSC on the way it has been done for the last 46 years, but it would not also be available to the applicants, as mandamus is only an "*appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. A fortiori it is should be an appropriate remedy to compel the performance of constitutional duty…. the court would be perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. But such intervention would only be by way of prohibition (if the act is incomplete) or certiorari (if the act is complete) and not by way of mandamus"* **(Jotham Mulati Welamondi v The Chairman of the Electoral Commission HCMscA No. 81 of 2002).** As rightly put by Mr. Kimamo, the Companies Act does not provide for any duty to be performed by the said Minister. The applicants on whom a duty to show the particular instance of neglect or non performance lies, have failed to demonstrate what duty the Minister had or has failed to perform under the Companies Act, in which case, I am unable to issue an order of mandamus.

The orders of prohibition as per their prayers II, III, and VI cannot be granted as the actions which they seek to enforce the orders against, had already been taken by the time when they obtained the "leave" to commence these proceedings.

Prayers IV and V would only obtain to those who are currently in management at the moment, but not to these applicants.

But I may as well as add that had the Judge been made aware of several facts at the ex parte stage, there was a likelihood that he may have decided differently on the ex parte application for leave, for parties who go before a Judge, ex parte have a duty to make a full and candid disclosure of material facts; including facts that may be against their case, for *"it must be clearly understood that a party who goes to the judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials, including even material which is against his interest. The basis for this requirement is obvious: it is a universal rule of natural justice that court orders ought to be made only after hearing or giving the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it……..a party who has obtained as ex parte order must be able to support that order, at the inter partes hearing, on the on the very same grounds upon which he was able to obtain it in the first place.*" (**as per Omollo J.A. in Uhuru Highway Development Limited v Central Bank of Kenya and others CA(Nai.) 140 of 1995.**

It is evident that many matters pertaining to the application, and the applicants, such as the fact that KSC was a state corporation which was required to comply with specified mandatory requirements, that the 2nd and 3rd applicants had already been charged with offences related to the contentious floatation, were concealed, and thus remained undisclosed when these applicants moved the court initially in their application for leave to commence these proceedings, and *'there having been a suppression of material facts by the applicant in her affidavit the court would refuse a writ of prohibition without going into the merits of the case"* (Ex parte Princess Edmond De Polignac [1917] I KB 486), and which was cited with approval in the aforementioned case of **Uhuru Highway Development Limited v Central Bank of Kenya and others**, which I need not say, is a decision that is binding on me, they would have had no audience before this court, and needless to say, the position would not be cured by the fact that the facts were raised in affidavits which were filed subsequent to those in the initial Chamber application.

The upshot of all this is that I find that the application which was void ab initio is otherwise devoid of merit and the same is dismissed with costs.

Dated and delivered at Eldoret this 6th day of April 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Nyairo Jnr with Mr. Nyairo Snr and Mr. Yano for the applicants.

Mr. Kimani for the respondents.

Mr. Kinamo for the interested parties.