REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION No.192 OF 2004

IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW

IN THE MATTER OF: THE SUGAR ACT 2001 (No.10 OF 2001)

A N D

IN THE MATTER OF: THE KENYA SUGAR BOARD

A N D

IN THE MATTER OF: THE MINISTER FOR AGRICULTURE THROUGH THE ATTORNEY GENERAL

A N D

IN THE MATTER OF: COMESA TREATY (COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA)

A N D

IN THE MATTER OF: REPUBLIC……APPLICANT

-V E R S U S

KENYA SUGAR BOARD……..……1ST RESPONDENT

ATTORNEY-GENERAL on behalf of MINISTER FOR AGRICULTURE……..2ND RESPONDENT

EX-PARTE MAT INTRNATIONAL LIMITED

R U L I N G

On 18th day of March, 2004 the ex-parte Applicant, namely, Mat International Limited (ex-parte Applicant) approached the court under Certificate of Urgency seeking orders pursuant to Order LIII Rules (1) and (2) Civil Procedure Rules and Section 8 and 9 Law Reform Act, Cap.26. The application was made ex parte as required under Rule 1(2) of Order 53 aforesaid.

The orders sought are for leave to institute application for Judicial Review Rule 1(4) provides that the grant of leave to apply for Judicial Review namely Orders of Certiorari or Prohibition "shall if the judge so directs, operate as a stay of proceedings in question until the determination of the application, or until the judge orders otherwise."

On that date the court after hearing the ex-parte application granted leave to file Judicial Review application for orders of certiorari and prohibition. The court also granted stay as provided under sub-rule 4.

The order of certiorari is sought to quash the regulation/or notice made by the Kenya Sugar Board vide advertisement in the East African Standard dated the 4/3/2004 imposing controls on importation of the allowed sugar quantities contrary to Comesa Regulations and contrary to Official Government position in the matter and also to bring up to High Court for quashing the letter dated 16.3.04 from Kenya sugar Board purporting to revoke the certificate of the registration of the Applicant contrary to Section 8 of the Sugar (Import Export on By Products) regulations 2003) and contrary to the rules of Natural Justice Orders for prohibition is sought to prohibit the Kenya Sugar Board from interfering with the allowed quota and from introducing non-tariff barriers against the Comesa Treaty and Sugar Act 2001. The order of stay was (1) to prohibit any act on the part of the Kenya Sugar Board to impose control on importation of Raw and Mill White Sugar up to a maximum of 89,000 tones as allowed pending the determination of the proposed Judicial Review application.

(2) to prohibit any act on the part of the Kenya Sugar Board to cancel and/or revoke the exparte Applicants certificate of registration pending the determination of Judicial Review application.

(3) to prohibit any act by Kenya Sugar Board from prohibiting the exparte Applicants from importing Raw and Mill White Sugar as long as it is within the quota pending the determination of the Judicial Review.

(4) to prohibit any act by the Kenya Sugar Board that contravenes Comesa Treaty. The grounds offered are that:- (1) by restricting the importation of sugar the Kenya Sugar Board is in contravention of Section 27 of the Sugar Act and also Comesa Treaty.

(2) That the action of the Kenya Sugar Board is not official Government policy as shown by Exhibits annexed.

The verifying affidavit was sworn by General Manager of the Ex-parte Applicant which shows that the ex-parte Applicant is engaged with business importation of sugar and other commodities within Comesa region including Kenya supplementing Kenya's deficit to alleviate shortfall for local consumption. It is also sworn that the ex-parte Applicant has received a letter dated 16/3/2004 purporting to revoke the Applicant's certificate of registration contrary to Regulations 2003.

Unless the stay is granted immediately to prohibit Respondents from implementing and or continuing to introduce controls the Applicant shall suffer irreparably by cancellation of their contracts already entered into for the importation of sugar. Counsel addressing the court submitted that some 2800 metric tones of sugar was already in the Highseas.

The exparte Applicant has therefore shown his interest in the matter.

As soon as the ex parte order was made Chief Litigation counsel for Attorney-General filed an application for Minister granted by this court on 18/3/04 as aforesaid under certificate seeking interim stay of the stay orders. Again the Kenya Sugar Board on 22/3/04 filed an application seeking to set aside orders of stay granted by this court on 18/3/04.

When these applications were brought to court they were placed before Resident Judge (in the absence of this court) and orders of stay were granted pending the hearing of the application inter-partes.

The result is that the stay granted on 18/3/04 was stayed as from 26/3/2004 and up to date are stayed. No sugar has been imported by the ex-parte Applicants since March 18th 2004.

On the 31st day of March 2004 the application by the two Respondents (Applicants in this application) were argued together. In the meantime ex-parte Applicant has filed his Judicial Review on 7/4/2004

which is now on record but pending hearing.

Whether the court has powers to vary, set aside or discharge an order of stay is to be found under Order 53 rule (1)4 which states:-

> "*the grant of leave ……..shall, if the judge so directs, operate as a stay of the proceedings in question until the judge orders otherwise.*"

The wording of this sub-rule clearly indicates that the curt has jurisdiction to review, vary, set aside or discharge stay and that the powers of court are discretionary. Referring to the review, varying or setting aside ex-parte orders by the court the matter was discussed in Civil Appeal No.77/2003 in Court of Appeal Judicial Commission of Inquiry to the Goldenberg Affair & Others vs. Job Kilachi. The Court of Appeal referring to the case of Ex-parte Harbage and the words of MAY L. J. quoted a passage on page 14 thus:-

> "The next point to make is that although appeal does lie to this court against an ex-parte order made by a judge of High Court……nevertheless in his judgment in that case Sir Donalds on MR [1983] 3 All E.R. 589 at page 593 said: "I have said exparte orders are essentially provisional in nature.
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> They are made by the judge on the basis of evidence and submissions emana ting from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from dischargin g or varying his original order. This being the case it is difficult if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of revie wing it in light of argument from the defendant and reaching a decision."

This passage highlights the approach a judge should make in considering the review variation or discharge of ex parte order.

> *Our Court of Appeal remarked "the ex parte order before that judge was an Anton Piller Order. Such orders can be made ex parte not because the rules provide that they be made ex parte but because of urgency of the matter they emphasized. We cannot think of a situation where a party would be allowed to come to this court (Appeal Court) before going to the judge who made the ex - parte order with a view to persuading him to set aside the order."*

The court proceeded to declare that application for leave to apply for Judicial Review Order 53 provides that the application shall be made ex parte to a judge in Chambers.

And a right of appeal to the Court of Appeal is donated under Law Reform Act, Cap.26, Section 8(5):- *"any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal concluded that the applicants in that case had a right of appeal and an option to returning to the judge who made the order ex parte for his review."*

In the present case the Applicants herein have taken the option of returning to this court which made the ex parte orders complained of.

Upon the examination of the Chamber Summons dated 22/3/2004 made on behalf of 1st Respondent (the Sugar Board of Kenya) the orders sought are couched thus:- 2) That pending inter partes hearing of this application, court be pleased to stay, set aside and or vacate its ex parte order granted on 18th day of March, 2004 and in particular:

(i) The stay granted against the Applicant herein from imposing control on importation of Raw and Mill white sugar and/or imposing any quota or any act amounting to control of Raw and Mill white sugar.

(ii) A stay of any acts on the part of the Applicant prohibiting the importation of sugar by the Applicant as long as it is within the quota and,

(iii) A stay against any act by the Applicant that contravenes Comesa Tready.

3)That pending inter-partes hearing of this application this court be pleased to stay and/or set aside its exparte order granted against the Applicant herein from canceling and/or revoking the Applicants Certificate of Registration.

4) That pending the final determination of this matter the court be pleased to set aside and/or vacate orders granted on the 18th day of March, 2004. 5) That this court be pleased to strike out or otherwise stay all further proceedings on this suit in view of the provisions of section31 of the Sugar Act 2001.

6) That the costs of this application be provided for.

As will be seen prayers 1, 2 and 3 were granted by Hon. Justice Mwera on 26.3.2004. The order was drawn and issued under the seal of this court on15th April, 2004. These orders of Hon. Justice Mwera were extended by this court pending the delivery of this ruling. To-day the said prayers are spent and no more need be said about them.

On the part of the 2nd Respondent (2nd Applicant) the application dated 26/3/2004 was filed on the same day.

Prayers sought for stay, vacate and/or set aside the ex parte orders made on 18/3/2004 pending hearing of application inter-partes were granted again by Hon. Justice Mwera on 26/3/2004 similarly as in the application of 1st Applicant.

Therefore, the only order outstanding on this application is that of cots.

From the above it will be seen that there is no prayer made in both applications specifically challenging the leave granted for commencement of application for Judicial Review.

The Applicants were dissatisfied only with the order of stay at this stage. The outstanding prayers in both applications are:-

(i) that pending determination of this matter, this court be pleased to set aside and or vacate its ex parte orders granted on 18/3/04. This can only mean stay orders already granted.

(ii) that the court be pleased to strike out or otherwise stay all further proceedings on this suit in view of the provisions of Section 31 of the Sugar Act 2001. This prayer should be made in the Judicial Review application. The proceedings granting leave had already terminated and cannot be stayed or stuck out.

The two prayers are vague and ambiguous in my view they raise issues to be canvassed at the hearing of the Judicial Review.

Considering the submissions of counsel on both sides it is my view that under provision of Law Reform Act, Cap.26 Section 8 and nine (9) and under the Order 53 rule 1(4) the High Court has jurisdiction to review, vary, discharge or set aside orders of stay granted under sub-rule (4) and an aggrieved party has the option of returning to the judge who issued the orders or to file an appeal to Court of Appeal.

I have examined the material laid before the court by both parties. I notice that the main concern of the ex-parte Applicant is that his trading status could be terminated by the cancellation of his registration with the Sugar Board – (1st Respondent). The letter threatening de-registration is dated 16.3.04. The other prayers involve the Applicant and also all other importers of sugar countrywide.

The remedies under the Judicial Review of certiorari is issued to bring up to High Court the decisions which are ultra vires or vitiated by error or illegality that it may be investigated and if found not passing the test the same is declared by High Court to be of no effect. Prohibition is issued to prohibit from exceeding jurisdiction and the implementation of acts which are ultra vires. It is "available to prohibit administrative authorities from exceeding their powers or misusing them."

These orders are issued on application of private persons whose rights, status or situations are affected. It is clear therefore that the remedies of Judicial Review cannot be ousted by any express provision in a statute providing that in respect of a particular matter specified therein the decisions of a particular body or authority shall be "final" and conclusive.

Hence Sugar Act not withstanding the provisions of Section 31 Sugar Act the jurisdiction of court is still available. That there is an alternative remedy open to the Applicant.

The Judicial Review process is designed to control the acts of statutory bodies like Kenya Sugar Board and acts of the Ministers and other bodies empowered to take decisions and other acts that may contravene the rights of individuals.

This is clearly stated in the decision of Akiwumi, J. as he then was, in the case of National Examinations Council . In this case it is complained that the statutory body Kenya Sugar Board is acting illegally etc these are matters the court had considered when granting leave to file Judicial Review. Whether the application is res judicata is a matter to be argued on the Notice of Motion and I would be wrong in making an investigation at this stage.

The other major issue I notice which concerns the Respondents deeply is that of enforcement of matters based on Comesa Treaty. It is not disputed that Kenya is a member of the Comesa Treaty. International Treaties and Conventions are not to be signed and abandoned. The same have to be domesticated sooner or later to conform to international system. I do not find any want of jurisdiction in Kenya courts to enforce our Sugar Act 2001 which is related to the Treaty.

However, these are the defences that the Applicants may raise at the hearing of the application of Judicial Review.

Upon consideration of all those matters and that the Applicants do not pray that stay granted by discharged, on my own motion and in the interest of good order, I am inclined on my own motion, to vary the order I granted for stay by setting aside the orders made under prayer (d)(i), (iii) and (iv).

However, stay regarding prayer (d)(ii) is upheld so that the Respondents are prohibited from canceling or revoking the Applicants Certificate of Registration pending hearing of the Judicial Review. I now deal with the Grounds of Opposition/Preliminary Objections filed by the ex-parte Applicant and dated 29/3/04.

I have already stated my view as to the jurisdiction of the court to entertain an application for review of stay order. I have perused the authorities submitted by the ex-parte Applicant and the very able argument of the lead counsel Mr. Ngatia for the ex-parte Applicants but I am not persuaded that there is want of jurisdiction to review as claimed.

I have also indicated that the substantive prayers herein at this inter partes hearing are really defences in the application for Judicial Review.

I therefore order that costs of this application shall be to ex parte Applicant, 2/3 (two-thirds) and 1/3

(one third) to the Applicants (Respondents) jointly.

Orders accordingly.

Dated and delivered at Mombasa this 21st day of May, 2004.

JOYCE KHAMINWA

J U D G E