



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

Misc. Civ Appli. 698 of 2004

THE REPUBLIC APPLICANT

VERSUS

THE PRESIDENT.....FIRST RESPONDENT

MINISTER FOR AGRICULTURE.....SECONDRSPONDENT

AND

PATRICK WANDABWA.....1ST INTERESTED PARTY

OBONGO NYACHAE.....2ND INTERESTED PARTY

PROFESSOR LEOPOLD MUREITHI.....3RD INTERESTED PARTY

PETER MBOYA.....4TH INTERESTED PARTY

BENJAMIN BETT.....5TH INTERESTED PARTY

PROFESSOR REUBEN OLEMBO.....6TH INTERESTED PARTY

**DEVELOPMENT
THE MANAGING DIRECTOR AGRICULTURAL**

CORPORATION.....7TH INTERESTED PARTY

THE GENERAL MANAGER

KENYA FARMERS ASSOCIATION.....8TH INTERESTED PARTY

THE PERMANENT SECRETARY

MINISTRY OF AGRICULTURE.....9TH INTERESTED PARTY

THE PERMANENT SECRETARY

OFFICE OF THE PRESIDENT.....10TH INTERESTED PARTY

HOSEA K. SITIENEI.....11TH INTERESTED PARTY

EX PARTE

SOET KENYA LIMITED.....1ST APPLICANT

R. B. SHAH (KENYA) LIMITED.....2ND APPLICANT

DAVID T. KIPLAGAT.....3RD APPLICANT

R U L I N G

In the application dated the 10th June 2004 brought by way of Chamber Summons under order 53 rule 1 of the Civil Procedure Rules, the three Applicants have sought leave to apply for judicial review and for orders of certiorari and mandamus against the first and second Respondents namely, His Excellency the President of the Republic of Kenya and the Minister for Agriculture respectively.

At the hearing of the application the court, of its own motion, raised the preliminary point of law as to whether the application is properly before the court having due regard to the protection afforded the 1st Respondent against both criminal and civil proceedings under section 14 of the Constitution of Kenya. The court directed Mr. Stephen Mwenesi, learned counsel for the Applicants, to address it on this point first for determination.

In his submissions, Mr. Mwenesi urged that section 14 (2) of the Constitution does not apply to the application as that section refers specifically to “**civil proceedings**” which, by their very nature, judicial proceedings are not. He cited the decision in **The Commissioner of Lands v. Kunste Hotel Ltd.** (Civil Appeal No. 234 of 1995) (unreported) in which the Court of Appeal distinguished judicial review proceedings in the following terms:-

“...in exercising the powers to issue or not to issue an order of certiorari the court is neither exercising Civil or Criminal jurisdiction. It would be exercising special jurisdiction.....”

Later in that judgment, the court observed that:

“judicial review is concerned not with private rights on the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”.

Relying on this and other authorities, including **Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation** [1948] 1K.B. 223, Mr. Mwenesi contended that as the 1st Respondent’s appointment of the Chairman of Kenya Seed Company Ltd. was unlawful because (*inter alia*) the said company is not a “**state corporation**” within the meaning of section 2 of the State Corporation Act [Cap. 446], the 1st Respondent’s executive decision can be challenged by way of judicial review otherwise the effect of section 14 of the Constitution would be dictatorial.

While I would respectfully agree that the **Kunste** case (supra) is a correct statement of the law, I am unable to agree and again with respect, with Mr. Mwenesi that section 14 of the Constitution does not apply to judicial review proceedings.

The marginal note to section 14 of the Constitution reads as follows:-

“ **Protection of President in respect of legal proceedings during office.**”

and sub-section (2) of section 14 aforesaid bars any civil proceedings against the President “**in which relief is claimed in respect of anything done or omitted to be done...**”

In my view, the intention of section 14 is absolute and in the widest terms in affording the President protection against all legal proceedings while in office the only exception being as is provided in section 10(2) of the Constitution. While fully agreeing that even the sitting President is subject to the provisions of the Constitution and any other written law, the same Constitution provides for the protection of the President in respect of any and all legal proceedings. Judicial proceedings are legal proceedings, albeit within a special jurisdiction, within the ambit of section 14 of the Constitution which, by virtue of section 3 thereof, must override sections 8 and 9 of the Law Reform Act [Cap. 26] and order 53 of the Civil Procedure Rules insofar as any proceedings against the President are concerned.

Having come to this conclusion, I find that I would have no jurisdiction to entertain proceedings against the 1st Respondent and accordingly do hereby order that the First Respondent namely, His Excellency the President, be and is hereby struck out from the application dated the 10th June 2004 and from all other documents filed therewith herein.

Dated and delivered at Nairobi this 21st day of June, 2004.

P. Kihara Kariuki

Ag. Judge