



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION NO.532 OF 2004

IN THE MATTER OF: An Application seeking Judicial Review under
Order LIII Civil Procedure Rules
A N D
IN THE MATTER OF: The Law Reform Act
IN THE MATTER OF: Sugar Act No.10 of 2001 and Customs & Excise
Act
A N D
IN THE MATTER OF: Kenya Revenue Authority Act
A N D
IN THE MATTER OF: The Customs & Excise Act

REPUBLIC.....APPLICANT

A N D

KENYA SUGAR BOARD.....1ST RESPONDENT

ATTORNEY-GENERAL (on behalf of

Ministry of Agriculture).....2ND RESPONDENT

A N D

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

EX-PARTE APPLICANT : KRISH COMMODITIES LTD

R U L I N G

This application is made under the provisions of Civil Procedure Rules Order 53 rules 1.(1) (2) (3) & (4). These rules are made by the Rules Committee under the provisions of Law Reform Act, Cap.26. PART VI which imported the law of Judicial Review from the Law of England and provides as follows:-

“PART VI

8(2) In any case in which the High Court of England is by virtue of provisions of section 7 of Administration Justice (Miscellaneous Provisions) Act 1938 of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari the High Court shall have power to make like orders.”

The orders that may be issued on Judicial Review are:-

- (1) Orders of Certiorari
- (2) Orders of Prohibition
- (3) Orders of Mandamus.

Judicial Review is supervisory jurisdiction of the High Court. It is the means by which judicial control of administrative actions is exercised. See **Council of Civil Service Unions v. Minister for the Civil Service**, [1985] AC 374 at 408 by Lord Diplock. The application of Judicial Review is the process by which prerogative orders are sought. The orders were created in order to ensure public bodies lawfully carried out their duties and kept within their jurisdiction.

Mandamus secures the performance of a public duty .

Prohibition prevents a public body from acting illegally or in excess of jurisdiction.

Certiorari quashes decisions which are contrary to law.

The procedure for making application for Judicial Review is to be found under the Civil Procedure Rules made by Rules Committee as aforesaid. Order 531(1) states:-

“No application for an order of mandamus prohibition or certiorari unless leave therefore has been granted in accordance with this rule. 1.(2) An application for such leave as aforesaid shall be made ex-parte to a judge in chambersthe judge may in granting leave, impose such terms as to costs and as to giving security as he thinks fit.

1(4) The grant of leave under this rule to apply for an order of prohibition or 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.” This application is therefore by Chamber Summons to seek leave to file judicial review to apply for “*orders in nature of certiorari, prohibition and mandamus.*”

1) to quash the decision of the Kenya Revenue Authority in press release dated 26/5/04 as being null and void.

2) to prohibit the respondents from releasing any consignment of sugar for 2004 Comesa Treaty quota to any importer other than the authorized importers listed under Gazette Notice No.3431 of 7.5.2004 subject to Legal Notice No.12 dated 1/3/2004 to avoid the applicants rights to import 5,000 M/T of sugar being prejudiced or compromised.

3) to compel the Kenya Revenue Authority to allow the applicant to import the 5,000 M/T allocated to it under Gazette Notice number 3431 of 7/5/2004 and to clear the sugar Duty Free under the Comesa Treaty terms free of any warehouse charges incurred while this Judicial Review is pending.

4) that the grant of leave to operate as a stay of respondent releasing, allowing or permitting any other party save those authorized under Gazette Notice 3431 of 7/5/04 as per the specific quotas permitted therein.” It is to be noted that at this stage substantive orders cannot be given. The court can only allow or refuse leave. Before considering the application for leave the court must be satisfied that a notice of the application has been given to the Registrar not later than the preceding day. The application is accompanied by a statement of 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 upon.

Upon examination of this application I find these provisions are complied with.

In giving leave the court is to consider whether there is a point fit for further investigation at a substantive hearing with all such evidence as is necessary on the facts and all such arguments as is necessary on the law – that there is an arguable case.

The hearing of Chamber Summons for leave should not be anywhere near so extensive as for the substantive Judicial Review hearing namely the hearing of Notice of Motion. The allegations made in the present case are several as stated in the statement and set out in the body of application summarized below.

The allegations are made against the Kenya Revenue Authority (hereinafter referred to as the Authority) and the Ministry who are conferred by law to deal with the control and management of all matters regarding sugar status in this country including exportation, importation thereof. However, although in excise of these powers the Sugar Board has granted a right to the Applicant to import 5,000 M/T of sugar as per Gazette Notice No.3431 and in the manner scheduled in that notice the Authority seeks to deny the rights so given by the Sugar Board to the applicant to import the 5,000 M/T of sugar by declaring that the Comesa sugar quota is now exhausted. This decision of the Authority is said to be completely illegal, unwarranted and expressly violates the principals of natural justice and effectively purports to penalize and punish the applicant while the applicant has acted within the law as it exists to-day.

The applicant is now prohibited by the Authority to land its quota of 5,000M/T sugar which is in contravention of the rights of the applicant.

In his argument Mr. Mogaka pointed out that under the Sugar Act 2001 Section 33 the Minister has authority to make regulations to provide for certain matters set out therein and

(a) the regulation and control of the production of manufacturing, marketing, importation or exportation of sugar and its by-products:

And in pursuance of the same the Minister of Agriculture has made such regulations under Legal Notice No.39 dated 9/4/2003. The applicant is registered as a sugar importer under Licence No. KSB/CR1/013/03 showing the date of issue 18.8.2003 and date of expiry 30/6/04 (Exhibit AS4). Counsel also pointed out that tenders were invited from Registered Importers for the importation of sugar specified by Gazette Notice No.2127 dated 17/3/2004.

On 29/3/2004 the Board advised the applicant:- “Reference is made to your bid for the importation of raw and mill white sugar under the provisions of Legal Notice No.12 dated 1/3/2004 in response to our earlier public advertisement and Gazette Notice No.2127 dated 17/3/04.

After a careful analysis and evaluation, we are pleased to confirm that you are hereby authorized to import raw and or mill white sugar up to a maximum of 5,000 M/T under the provisions Legal Notice No.12 during the period of June/July 2004. Any further quantities imported above this limit and or outside this period shall be subject to payment of full duties, taxes and levies as per provisions of the Customs and Excise Act, Cap.472 and Sugar Act 2001.”

Upon perusing Exhibit AS.6 dated 3/5/04 Gazette Notice No.3431 it sets out the companies authorized by the Board to import the quantities of raw and mill white sugar.

It is to be noted here that the dispute arises from the benefit to be obtained by traders from importing Comesa region sugar as indicated pursuant to Gazette notice No.2127 of 2004. This applicant is authorized to import 2,500 M/T for period May/June and 2,500 M/T for the period June/July 2004 making a total of 5,000 M/T. It is also to be noted that the allocation of importers listed in the Notice exhausts all the 89,000 M/T to be imported this year (2004) from Comesa region as specified in the Legal Notice No.12 made on 28/2/2004 and signed by Minister for Finance himself and notified to members of public under Notice in the East African Standard of March 4th 2004 by the Sugar Board. It is therefore clear that the decision of the Kenya Revenue Authority that the Comesa quota of 89,000 M/T of sugar is now exhausted except for some 4.15 M/T which can be imported under Comesa terms – duty free is not correct.

The applicant’s concern is then when and by whom was his quota of 5,000 M/T landed? It is therefore

alleged that if the Comesa quota is exhausted the Respondents did unlawfully permit unauthorized importers to bring in sugar on Comesa duty free terms. This is in breach of the applicant's rights to enjoy the duty free terms. There are exhibits that contracts have already been entered into for importation of sugar from Cairo Egypt (Exhibit AS8(i) to (v)).

Counsel submits that in HCC Misc. 192/04 although an initial stay for Board's activities was granted on 18/3/2004 this stay was set aside by Justice Mwera was stayed on 26/3/2004. Before the said Judge it was confirmed in court that no importation of sugar had taken place as from 18/3/04. No final orders have been made in this case until the hearing of Notice of Motion.

In that case therefore only leave was granted to file Judicial Review which is now filed and pending hearing in Nairobi High Court and the attempts of the Authority to deny that commercial right to Applicant is without its jurisdiction.

The Authority of Kenya Revenue Authority is to collect revenue while the work of the Sugar Board is to regulate and to control the importation .

The applicant's counsel further submits that in view of the orders made by this court in the Misc. H.C.C. 192/04 the authority of the Sugar Board has not been suspended by court. It was re-instated. Therefore the right granted to the Applicant to import duty free sugar under Comesa is lawful sugar so as not to destroy local sugar industry. Counsel has exhibited several newspaper reports concerning the confusion reigning in the public domain regarding the importation trade of the Comesa Region sugar in this country. From what I can see the Sugar Board is charged with the primary duty of licensing sugar importers as per regulations mentioned above and in my view from the arguments advanced by the counsel for the applicant the Sugar Board has attempted to do so by following the regulations. The Revenue Authority's role in the matter is processing importation papers and collecting Government revenue if any payable before releasing the sugar imported.

It goes without saying that the Revenue Authority can only release sugar imported in accordance with the authority given by the Sugar Board of Comesa Region sugar – duty free.

In case of other sugar – full duty and taxes and levies have to be paid according to the law relating thereto.

In view of the public outcry and counter-accusations ranging in the press, I have to state as follows:- The duty of a Judge is to protect the law. It is recorded in a speech attributed to Lord Mansfield in the case of **R v. JOHN WILKES** (1770) 4 BWR 2527, 2563 and I quote:-

“I will not do that which my conscience tells me is wrong, upon this occasion, to gain the buzzes of thousand, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right though it should draw on me the whole artillery of libels; all that falsehood and malice can invent or the credibility of a deluded populace can swallow. The Constitution does not allow reasons of State to influence out (Judges) judgments. We must no regard political consequences how formidable soever they might be: If rebellian was the certain consequence we are bound to say ‘fiat justilia ruat caelum’ meaning ‘Let justice be done though the heavens fall.’”

In the same spirit I say the disputes ranging is because of the reasons of huge profits said to be harvested in Comesa sugar trade where duty and other taxes are exempt as opposed to importation of other trade where duty is 100% plus taxes and other charges.

Nevertheless, the dispute must be resolved through the exercise of legal provisions by all parties. That is the reason for creation of the process of Judicial Review.

Therefore, in this case I am persuaded by the applicant that its rights are breached and he is entitled to apply for Judicial Review.

I allow the application and grant leave sought.

The leave granted shall apply as a stay of importation of all Comesa duty free sugar pending the hearing of this Judicial Review since the Kenya Revenue Authority have declared the quota is exhausted. The urgency of this matter is of commercial importance the judicial application shall be filed and served within the next 7 days and there shall be at least 5 clear days between the service of Notice of Motion and the date set down for hearing on priority basis.

Costs in the cause.

Dated at Mombasa this 14th day of June, 2004.

JOYCE KHAMINWA

J U D G E