



REPUBLIC OF KENYA

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

Misc Civ Appli 698 of 2004

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
AND FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

IN THE MATTER OF: THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE COMPANIES ACT CHAPTER 446 OF THE LAWS OF KENYA

IN THE MATTER OF: GAZETTE NOTICES NO. 8976 OF 2003 AND GAZETTE NOTICE NO. 3 OF 2004 BY THE PRESIDENT AND THE MINISTER FOR AGRICULTURE RESPECTIVELY CONCERNING THE “APPOINTMENT OF CHAIRMAN” AND THE “APPOINTMENT OF DIRECTORS” RESPECTIVELY OF THE KENYA SEED COMPANY LIMITED.

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

IN THE MATTER OF: THE CIVIL PROCEDURE ACT, CHAPTER 21 OF THE LAWS OF KENYA AND THE CIVIL PROCEDURE RULES MADE THEREUNDER

IN THE MATTER OF:

**THE
REPUBLIC.....
.....APPLICANT**

VERSUS

**THE MINISTER FOR AGRICULTURE.....
RESPONDENT**

AND

**PATRICK WANDABWA.....1ST
INTERESTED PARTY**

**OBONGO NYACHAE2ND
INTERESTED PARTY**

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

PETER MBOYA.....4TH
INTERESTED PARTY

BENJAMIN BETT.....5TH
INTERESTED PARTY

THE MANAGING DIRECTOR,

AGRICULTURE DEVELOPMENT CORPORATION.....7TH
INTERESTED PARTY

THE GENERAL MANAGER,

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

THE PERMANENT SECRETARY, MINISTRY OF AGRICULTURE.....9TH
INTERESTED PARTY

THE PERMANENT SECRETARY, OFFICE OF THE PRESIDENT10TH
INTERESTED PARTY

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

EX PARTE

SOET KENYA LIMITED
1ST APPELLANT

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

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

RULING

In an application dated the 10th June 2004 brought by way of Chamber Summons under order 53 rule 1 of the Civil Procedure Rules, the three ex parte 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 Honourable 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 President against both criminal and civil proceedings under section 14 of the Constitution of the said Republic.

In my Ruling dated the 21st June 2004, I found and held that I would have no jurisdiction to entertain judicial review proceedings against the President and accordingly ordered that His Excellency as the First Respondent to the said application be struck out therefrom.

The Applicants, being aggrieved by my order aforesaid and rather than appealing against the

decision pursuant to section 8 (5) of the Laws Reform Act [Cap 26] have elected to move this court by way of a Notice of Motion dated and filed on the 19th July 2004 brought under section 60 of the Constitution and sections 3 and 3A of the Civil Procedure Act seeking orders including review of my said Ruling made on the 21st June 2004 and the Order resulting therefrom and also the setting aside of my decision in its entirety. The motion is premised upon the nine grounds set out hereunder as follows:-

a) The learned judge erred on the face of the record to find that the decision of the Court of Appeal in **The Commissioner of Lands v. Kunste Hotel Limited** (Civil Appeal No. 234 of 1995) is a correct statement of the law and then proceeded not to apply it.

b) The learned judge erred and relied on and gave greater emphasis to the marginal note to section 14 of the Constitution of Kenya rather than the words of the enactment in the body of the section which clearly bars civil proceedings against the President rather than judicial review proceedings, which are a special jurisdiction of the High Court within the meaning of section 3 of the Civil Procedure Act and section 60 of the Constitution of Kenya, for ensuring inter alia accountability of the executive authorities in the Republic of Kenya.

c) The learned judge erred and relied on the marginal note to section 14 of the Constitution of Kenya to deduce that in his view the intention of section 14 is absolute and in widest terms in affording the President protection against all legal proceedings while in office the only exception being as provided in section 10(2) of the Constitution.”

d) The learned judge erred and failed to appreciate that section 10(2) of the Constitution of Kenya relates to the High Court jurisdiction that is neither civil nor criminal which is conferred by section 44 of the Constitution and the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya in the similar way that the Law Reform act confers the jurisdiction for judicial review and which is saved by section 3 of the Civil Procedure Act and recognized by section 60 of the Constitution of Kenya.

e) The learned judge erred in law and fact to find that the constitution “provides for the protection of the President in respect of any and all legal proceedings”.

f) The learned judge erred to find and hold that by virtue of section 3 of the Constitution of Kenya section 14 thereof “must override section 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. The learned judge ignored or failed to appreciate that section 60 of the Constitution of Kenya which establishes the High Court and defines the powers and jurisdiction of the High Court specifically recognizes

“such other jurisdiction as may be conferred on it by This Constitution or any other law.”

g) The learned judge erred to find that he would have no jurisdiction to entertain proceedings against the 1st Respondent and to order that the First Respondent be struckout from the application dated 10th June and from all other documents filed therewith in the proceedings before the Honourable Court.

h) The learned judge ought to have ordered the proceedings to go on inter-parties and the Attorney-General to be required to appear to assist the court as the constitutional principal legal adviser to the Government to assist the court and the parties in determining the issue, especially as the court raised the preliminary objection that caused the decision for which review is sought.

i) The court has inherent powers to make orders necessary for the ends of justice and to ensure that the process of the court is properly used.

and is supported by the affidavit of Stephen Musalia Mwenesi, learned counsel for the Applicants, also made on the 19th July 2004.

In lengthy submissions, which need not be reproduced here, Mr. Mwenesi urged that the Court of Appeal having held in **The Commissioner of Lands v Kunste Hotel Ltd.** (Civil Appeal No.234 of 1995) (unreported) that this court in exercising the powers to issue or not to issue an order of certiorari is neither exercising Civil or Criminal jurisdiction but a special jurisdiction, am bound by that decision to find that judicial review proceedings, and consequently the Chamber Summons application dated the 10th June 2004 do not, fall within the ambit of section 14(2) of the Constitution which refers specifically to “*civil proceedings.*” Citing *R v. Kele* 1977 3 All ER 1099 at 1102, and a host of other judicial authorities, counsel contended that I had erred and relied on and gave greater emphasis to the marginal note to section 14 aforesaid, such marginal note being merely an indication but not a definition of the contents of the section. Mr. Mwenesi also referred me to several other decisions in the line of **R (on the application of Bulger) v Secretary of State (for the Home Department and Another)** (2001) EWHC Admin 119 in support of his argument that decision makers, the President included, must be called to account by way of judicial review lest the rule of law break down and private rights be denied by public bodies.

I have considered the Motion dated the 19th July 2004 in light of the submissions of learned counsel as well as the judicial authorities he has referred me to. I have noted that such decisions, though of some assistance, are not altogether relevant as they were not made in the context of section 14 of the Constitution. Indeed, those of them from the English jurisdiction must be construed and considered against the critical fact that there is no written constitution in the United Kingdom with a corresponding provision to section 14 of the Constitution of Kenya.

The Applicants, relying on the observation of the Court of Appeal in the **Kunste** case (supra) that judicial review proceedings are neither Civil nor Criminal, contend that such proceedings cannot possibly fall within the ambit of section 14(2) of the Constitution and are therefore excluded from the protection afforded therein to the President against civil proceedings. It is therefore necessary for me to consider whether or not the interpretation adopted by the Applicants to section 14(2) aforesaid is consistent with the legal principles as to the interpretation of that provision.

The cardinal rule for the construction of Acts of Parliament as developed and enunciated by the English Courts, and applied by the Privy Council in interpreting the constitutions of some of the Commonwealth countries such as Canada and Australia, is that “**the rule of law upon which the constitution of all statutes is based is to construe them according to the plain, literal and grammatical meaning of the words**” which rule has also been adopted by the Indian Courts. A useful discussion thereof and of the related cases is to be found in the 2000 edition of **Constitutions of the World** by M V Pylee (at page XIX ff) and in other treatises such as **Craies on Statute Law** (sixth edition) and **Bennion’s Statutory Interpretation** (second edition) and **Maxwell’s** leading authority **On the Interpretation of Statutes** (eleventh edition).

In **Magor & St. Mellons District Council v Newport Corpn.**[1950] 2 All ER 1226 at 1236 Denning LJ (as His Lordship then was) attempted unsuccessfully, to introduce a more liberal interpretation of statutes in the following words:-

“We sit here to and out the intention of parliament and of Ministers and carry it out and we do it better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.”

The House of Lords disagreed in appeal (**Ibid.**, (1951) AC 189 at 191), Lord Simonds, in replying to Denning, LJ, stating that “**If a gap is disclosed the remedy lies in the Amending Act**”

Between these two extremes, however, one emphasizing the literal aspect and the other emphasizing the purpose aspect - it is difficult to evolve a Mingle compromise formula. Recognizing that judges are not to sit helpless with their hands folded awaiting legislative action to rectify a defect in a statute by an amending Act, the courts in the United States of America have sought to arrive at a reasonable conclusion through interpretative process. In applying this doctrine of progressive interpretation, Chief Justice Hughes of the United States Supreme Court in **Home Building and Loan Association v. Blaisdell** (1934) 290 U S 398 at 442 succinctly expressed it thus:

“It is no answer to say that the public need was not apprehended a century ago or to insist that what the provision of the constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be coned to the interpretation which the framers, with the conditions and outlook of their time and have placed upon them, the statement carries its own refutation.”

I now adopt and apply the foregoing principles to the application at hand and in interpreting section 14(2) of the Constitution which is in the following terms:-

“No civil proceedings in which relief is claimed in relief of anything done or omitted to be done shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of president”.

There is no doubt that the Constitution is, in fact, a statute, but with the difference that it is a Constitution Act while a statute is a Legislative Act made through ordinary legislative process. The Constitution is the fundamental and supreme law of our Republic to which all other laws must conform: **The Constitutions of the World** (supra).

It is the Applicants case, they contend on the authority of the **Kunste** Case (supra), that I should read into section 14(2) aforesaid the words **“except judicial review proceedings”** after the words “civil proceedings” because judicial review proceedings are a “special jurisdiction”.

With profound respect, section 14(2) must be read in conjunction with section 14(1) of the Constitution which relates to **“criminal proceedings”**; the reference to “civil proceedings” in section 14(2) must, in the context of the whole section, be construed to mean all legal proceedings (as stated in the marginal note), the reference to **“civil proceedings”** being, in my view, in the wider meaning that is the say as opposed to **“criminal proceedings”**. If that was not the case, the courts merely by designating any proceedings to be **“special proceedings,”** could remove such proceedings from the ambit of section 14(2) aforesaid. No such power has been granted to the courts under the Constitution nor can the **Kunste** decision (supra) be construed as such. Further, it is noteworthy to observe that the Law Reform Act was enacted in 1956 in - it cannot, therefore, be said that Parliament was ignorant thereof when the Constitution took effect at independent in 1963. If it had been the intention of Parliament to exclude judicial review proceedings from section 14(2) of the Constitution, Parliament would have expressly so stated. In the absence of an appropriate provision in the sub-section to that effect, I am not persuaded by the Applicants that I should speculate as to the intention of Parliament. In **R v. Wimbledon Justices, ex. p. Derwent** [1953] 1. Q. B. 380, Goddard, C.J. said that **“although of construing an Act of parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there and if the statute has created a special fence, it is not for the court to find other offences which do not appear in the statute.”**

The **Kunste** decision (supra) must also be considered in light of the provisions in sections 8(1), 8(5) and 9 of the Law Reform Act - section 8(1) is indicative that the orders set forth therein are

issued by this court in exercise of its **civil** or **criminal** jurisdiction. Section 8(5) of the said Act goes on to state that appeals lie to the Court of Appeal against orders made in the High Court in exercise of its **civil** jurisdiction. Finally, rules of court, such as those promulgated under order 53 of the Civil Procedure Rules relate to procedure of **civil courts**.

It would seem to me that judicial review proceedings while being within a “**special**” jurisdiction (as are proceedings under the Children Act No.8 of 2001 and the Anti - Corruption and Economic Crimes Act, No. 3 of 2003) are nonetheless civil proceedings within the meaning and for all **purposes** of section 14(2) of the Constitution.

The foregoing notwithstanding, and as noted in my said Ruling of the 21st June 2004, the Law Reform Act is subordinate to section 3 of the Constitution. Indeed, the decision of this court in **Okunda and Another v. Republic** [1970] E.A. 453 at 457 emphasized the pre-eminence and the fundamental character of the Constitution as the supreme law rather than of any one organ of Government, the Executive and the Presidency included.

This court in a Ruling dated the 10th April 2003 by Githinji, J (as His Lordship then was) in **Abdul Karim Hassanally and Another vs. Westco Kenya Ltd. and Two Others** (HCCC No.1338 of 1997) (unreported) held that “**The Constitution is the will of people and I do not think that the constitutional provisions protecting the President from legal proceedings can be said to be against Public Policy.**” In the earlier decision in **Jean Kamau and Another v. The Electra Commission and Two Others** (Misc. Application No. 193 of 1998) (unreported) this court (Aluoch, Mboghli-Msagha and Mitey, JJJ) held that:-

“The provisions of Section 14 of the Kenya Constitution are in the plainest language. They contain no ambiguity. The purport thereof is that no suit of whatever nature may be commenced nor continued against a sitting President of the Republic of Kenya. It would be mischievous for anyone to attempt to go round these express provisions of the law and accept to goad the coup to vest of itself a power not conferred, at upon it by the constitution. Be entirely agree with the counsel for the second respondent that this court has jurisdiction to summon a sitting President only when the issue of his election as president arises. This jurisdiction is expressly provided in section 10(2) of the constitution.”

This interpretation was re-affirmed in the subsequent decision in Sam **Karuga Wandai v. Hon. Daniel T. Arap Moi and Another** (Misc. Application No. 140 of 1998) (unreported). I am further fortified and guided by the Cayman Islands decision in **In re Fedele** (1988) LRC (Const.) in which it was held that “**the orders of certiorari prohibition and mandamus as manifestation of the royal prerogative were not available as remedies against decisions of the Governor when analog as the representative of Her Majesty the Queen.**”

Similarly, Article 361 of the Constitution of India provides absolute immunity to the President for the exercise and performance of the powers and duties of his office or for any act done or purporting to done by him in the exercise and performance of those powers and duties. The immunity so conferred does not restrict the right of any person to bring appropriate proceedings against the Government of India.

In addition to the foregoing, I have also considered the question as to whether or not the Presidency is an inferior body or tribunal to the High Court so as to be amenable to supervisory jurisdiction of the court through judicial review. In my reading of the principles set out in the Court of Appeal decision in **Kenya National Examinations Council v. Republic (ex parte Geoffrey Gathenji Njoroge and Nine Others** (Civil Appeal No. 266 of 1996) (unreported), considered in conjunction with section 14(2) of the Constitution, I am unable without an express constitutional provision 15 to agree that the remedies of mandamus, prohibition and certiorari are available against the President.

If, as I find and hold, that section 14(2) of the Constitution protects the President against all legal proceedings, then it is irrelevant how proceedings instituted against the President are commenced. Whether by way of plaint, originating summons, judicial review or any other cause by whatever name called, any and all such proceedings would require the President to submit to jurisdiction, to file defences and grounds of opposition and/or replying affidavit which would open the President to cross-examination and make him liable to awards. These are the very eventualities that section 14(2) of the Constitution seeks to protect whether they are described as “**civil proceeding**” or special proceedings” or in any other manner.

In conclusion, I am not by any means saying that the applicants, if in fact they have been aggrieved, are without any remedy. But whatever remedy they may have is most certainly not against President of the Republic Kenya and they would be well advised to look elsewhere for redress.

Accordingly, and for the reasons aforesaid, it is ordered that the Notice Motion dated the 19th July 2004 be and is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this 19th day of October 2004.

P. Kihara Kariuki

Ag. Judge