REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC APPLICATION NO. 621 OF 2000

SAMWEL MUCHURI W. NJUGUNA & 6 OTHERS..... APPLICANT

VERSUS

THE MINISTER OF AGRICULTURE..... RESPONDENT

RULING

This application is for leave to apply for orders of:

(a) CERTIORARI to remove into the High Court and quash THE TEA (ELECTIONS) REGULATIONS 2000 made by the Minister of Agriculture and also to quash THE TEA ELECTIONS PROGRAMME promulgated by Minister for Agriculture vide Ministers press statement dated 18.5.2000 so far as the statement purports to direct the elections affecting the running and management of Tea factories, constituted, incorporated and registered under the Companies Act (Cap 486 be held on 19.6.2000.

(b) PROHIBITION prohibiting the Minister from implementing the TEA ELECTIONS PROGRAMME

The applicants also pray that the grant of leave do operate as a stay of THE TEA (ELECTIONS) REGULATIONS AND THE TEA ELECTIONS PROGRAM.

The 1st and 2nd applicants are growers of the tea under the auspices of

MATAARA TEA FACTORY.

The 3rd and 4th applicants are growers of tea under the auspices of

Theta Tea Factory.

The 5th applicant is a grower of tea under the auspices of Ragat Tea factory.

The 6th and 7th applicants are growers of tea under the auspices of Ndima

Tea factory.

The application is supported by a statement and an affidavit sworn by Mr. Samwel Muchiri W. Njuguna - first applicant.

The TEA (ELECTION) REGULATIONS 2000 were made by the Minister of Agriculture after consultation with Tea Board of Kenya on 11.5.2000. They were made in exercise of the Ministers powers conferred by section 3, 4, and 25 of the Tea Act (cap 343). They were published in the special issue of

Kenya Gazette supplement No. 32 (legisletive) supplement No (19) under legal Notice 43 of 12.5.2000.

Section 25(1) of the Tea Act gives Minister in charge of Agriculture power, in consultation with Tea Board to make regulations for the protection, and promotion of tea industry in Kenya and generally for the better carrying out of the provisions of the Act. S. 25(2) of the Tea Act as amended by Tea (Amendment) Act No. 6 of 1999 specifies the kind of regulations the minister can make without prejudice to the generality of the power conferred by s. 25(1) of the Act.

The TEA (ELECTIONS) REGULATIONS 2000 is subsidiary legislation made by the Minister of Agriculture under s. 25 of the Tea Act. The definition of written law in s. 3(1) of the interpretation and General provisions Act (cap 2), means, inter alia, any subsidiary legislation for the time being in force. Section 31 of the interpretation and General provisions Act prescribe general provisions with respect to power to make a subsidiary legislation.

By s. 31(c) of Cap 2 a subsidiary legislation can be amended by the same authority which made it. By s. 34(1) of cap 2, a subsidiary legislation can be nullified by the parliament. By s. 33 of cap 2, acts done under subsidiary legislation are deemed to be done under the Act which authorized the making of the subsidiary legislation. The Language of a statue if clear and explicit, speak the intention of the Legislature.

It is the parliament which enacted s. 25 of the Tea Act giving the Minister of Agriculture power to make laws. It is clear from what I have said above that a subsidiary legislation has the same status as any written law and is made with the authority of the Parliament. At page 60 of Judicial Review Handbook by Michael Fordham, the author says:

> "Except so in so far as subordinated to community law, parliaments authority is supreme and its mandates are to be enforced and respected by reviewing courts"

Again at page 64 of the same treatise, the authors say:

> "Since parliament can do anything, it can effect change. Judicial initiative is often refused (and ironically sometimes sought to be justified) on the basis that it is for the legislature to remedy defects in the law"

The doctrine of seperation of powers is well known. The Parliament is the supreme organ of the Government which makes the laws. The Judiciary interprets the laws. At page 60 para 8.1.1 of Judicial Review Handbook (supra)

> "it is not for the courts to embellish, alter, subtract from or add to words which, for once at least parliament has employed without any ambiguity at all" and at para 8.1.2. "However much the courts may replicate an Act they must apply it "

The applicants have stated three main grounds to support the orders of certiorari and prohibition which they intend to seek and Mr. Muturi Kegano for applicants has exhaustively put forth the applicants case. The applicants complain inter alia the Tea Elections Regulations 2000 and the Tea Election Programme are ultra vires the Tea Act; that the Act does not give the Minister power to make decrees regulating management of Tea factory companies; that decree is offensive to the Tea Act and the companies Act and is unconstitutional etc.

It is however clear that applicants intend to apply for an order of certiorari to quash the TEA (ELECTIONS) REGULATIONS ACT and the TEA ELECTION PROGRAMME made under the Tea (Elections) Regulations. The applicants also intend to apply to the High Court for order of prohibition to prohibit the Minister from implementing the Tea Elections Programme.

It is clear that applicants intend to apply for an order of certiorari to quash THE TEA (ELECTIONS) REGULATIONS 2000. I have already said that the TEA (ELECTIONS) REGULATIONS 2000 is a

subsidiary legislation which enjoys the status of a written law. That subsidiary legislation can only be amended by the Minister of Agriculture or nullified by the Parliament itself.

The Court of law has no jurisdiction to quash a legislation however unpopular it may be. The court would be interfering with the supremacy of the parliament if it were to interfere with legislation made by the parliament or power given by the Parliament.

So, assuming but without deciding, that, the grounds to support the intended application are valid and that infact the TEA (ELECTIONS) REGULATIONS 2000 are ultra vires the Tea Act, the Court would not have power, on an application for order of certiorari, to quash the TEA (ELECTIONS) REGULATIONS 2000. That is to say that, the intended application for order of certiorari has no legal foundation and will not give applicants any effective remedy.

The TEA ELECTIONS PROGRAM is promulgated from THE TEA (ELECTIONS) REGULATIONS 2000 and if the court has no power to quash the TEA (ELECTIONS) REGULATIONS 2000, court also have no power to quash the PROGRAMME based on the Ministers powers under the TEA ELECTIONS REGULATIONS 2000.

It appears that applicants have brought the applications without appreciating that THE TEA (ELECTIONS) REGULATIONS 2000 is infact a subsidiary legislation and on the legally erroneous assumption that court has power, through an application for order of certiorari, to quash a legislation and to stop the operation of a legislation.

For those reasons, the intended application for orders of certiorari and prohibition has no legal foundation and will not give applicants any remedy or effective remedy. It would therefore be an act in futility to grant applicants leave.

It is for the above reasons that I dismiss the application for leave.

E. M. Githinji

Judge

14.6.2000

Mr. Kigano and Mr. Kagiri for applicants present

Mr. Kigano

I apply to appeal if leave be necessary. Secondly May I be allowed to

photocopy the proceedings and Ruling.

E. M. Githinji

Judge

8 Order: 1. Leave to appeal if required is granted.

2. Leave to take photocopy of the proceedings and Ruling given

E. M. Githinji

Judge