



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

JUDICIAL REVIEW NO. E002 OF 2020

REPUBLIC.....APPLICANT

V E R S U S

1. COMPETITION AUTHORITY OF KENYA.....1ST RESPONDENT

2. DEL MONTE KENYA LTD.....2ND RESPONDENT

3. THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

CHARLES MWAURA.....EX PARTE APPLICANT

RULING

1. On the 27/7/2020, the Ex parte Applicant Charles Mwaura upon application was granted leave to bring these Judicial Review proceedings to apply for;

a) Orders of certiorari to remove into this court and quash the 1st Respondent decision comprised Gazette Notice No. 463 dated 15/01/2020 and published on 24/1/2020 being a settlement undertaking for 2nd Respondent consumer welfare contravention.

b) That leave be and is hereby granted to the Ex-parte to apply for an order of prohibition to prohibit 1st Respondent from entering into or determining by way of settlement/gazette any matter falling under consumer welfare (Section 55-65 of Competition Act) save otherwise in compliance with Section 70 of the Act.

c) That leave be and is hereby granted to the Ex-parte applicant to apply for an order of mandamus to compel the 1st Respondent to release investigation report and findings, contents of the settlement herein to the Ex-parte applicant, publish the same in their official website and/or including placing the same to office of the Director of Public Prosecutions for possible criminal investigation and prosecution pursuant to Section 70 of Competition Act.

d) That leave granted for orders herein do operate as stay pending hearing and determination of substantive judicial review application.

e) That the substantive application be filed and served and the matter be mentioned on 7th October 2020.

2. He was directed to file the substantive application and serve upon the Respondents for mention on the 7/10/2020.

3. On the 5/10/2020, the Ex parte applicant filed a Notice of Motion (Ex parte) under **Articles 19, 22, 23 of the Constitution and Rule 34 of the Practice and Procedure Rules 2013**, popularly known as the “**Mutungu Rules**” seeking;

1) **An order for waiver of court filing fees on public interest Judicial Review Litigation pursuant to the leave granted on the 27/7/2020.**

2) **Costs be provided for.**

4. The Ex parte applicant swore and filed the affidavit in support on the 28/9/2020. Among the grounds for the application are that the –

- a) **Applicant is unemployed with no source of income despite been a 2015 University of Nairobi Mechanical Engineering graduate but devoted to ensuring the rule of law.**
- b) **That the applicant cannot afford the fees levied of Kshs 18,000/- as is an impossibility and beyond affordability of the applicant.**
- c) **That the petition is being prosecuted pro bono for great public interest.**
- d) **That the substantive Judicial Review application present fundamental triable Constitutional issues having been granted leave for its filing.**
- e) **The intended petition is a public interest litigation brought under Article 22 of the Constitution seeking to enforce Constitutional rights under the Bill of rights.**
- f) **Article 23(1) exempts and waives any court filing fees on all applications brought under the enforcement of the Bill of rights.**
- g) **The Petition seeks protection and enforcement of public consumer rights under Article 46.**

5. When the Advocates for the parties appeared before me for hearing of the application, both urged the court to determine the application on the materials and affidavit evidence as filed.

6. The “**Mutunga Rules**” were published under Legal Notice No. 117 of 28/6/2013.

Rule 35 provides for waiver of court fees thus;

- 35 (1) A person who wishes to be exempted from paying court fees may apply to the Registrar.**
- (2) An application under sub-rule (1) may be made by informal documentation.**
- (3) The reasons for the Registrar’s decision shall be recorded.**

7. An Applicant may also seek a waiver through pauper brief application as set out under **Order 33 of the Civil Procedure Rules**. The applicant must make the application in person.

Order 33 rule 3 states;

- 3(1) These rules shall apply to all proceedings made under Article 22 of the Constitution.**
- 10(1) An application under Rule 4 shall be made by way of a petition as set out in Form A in the schedule with such alterations as may be necessary.**

8. The Mutunga Rules govern proceedings brought or initiated under Article 22 of the Constitution for protection and enforcement of fundamental rights and freedoms. The overriding objectives of the rules is to facilitate access to justice for all persons as required under **Article 48 of the Constitution**.

9. Rule 33 provides that there shall be paid in respect of all proceedings under these rules the same court fees as are payable in respect of the Civil proceedings in the High Court in so far as the same are applicable. Rule 34 however provides for exemption from paying court fees upon application to the Registrar.

10. For one to qualify under the “**Mutunga Rules**”, the inability to pay the court fees, as a matter of fact, must be clearly stated and established.

11. The ex parte applicant swore the affidavit in support. His averments as stated on the face of the application are not substantiated. Other than stating that he is an unemployed University graduate, he found it not necessary to annex documents to authenticate his averments.

12. This is a fact that an applicant ought to prove as anybody approaching the court for a remedy must prove. It is not enough to only state. To that extent, the applicant’s inability to raise the assessed court fees of Kshs 18,000/- is but a mere statements of no evidential value.

13. In addition, **Rule 3(1)** is specific that the rules shall apply to all proceedings made under **Article 22 of the Constitution**, and no others; and shall be in the form of a petition as set out in Form A in the schedule.

14. A reading of the rules refers to Constitutional petitions. What the ex –parte applicant seeks to bring or file are Judicial Review proceedings, not Constitutional proceedings. This is evident as leave to bring the Judicial Review proceedings was granted by the Court.

15. Judicial Review applications objectives are to review administrative decisions of Government and its agents of the decision making process. It is a constitutional supervision of public authorities involving a challenge to the legality and validity of the decision. Any person aggrieved by an administrative action or decision may apply to court for Judicial Review of the action.

16. I have considered the materials presented in the application before me. Other than the Orders of leave. In Misc. Application No. 18/2020, no substantive statements or affidavits to expound on the basis of the orders. The application for leave is not annexed, nor are the statements and affidavits exhibiting the complaints against the Respondents. Such is not sufficient to persuade the court to make an order allowing the application, as to do so would be acting in darkness. Orders of a court are made upon informed material facts.

17. It is only upon such disclosure that the court would be in a position to determine whether or not any of the fundamental freedoms under the Bill of rights as enshrined under **Article 22 of the Constitution** has been violated.

18. For the above reasons, I find no merit in the application dated 28/9/2020. It is dismissed with no orders as to costs.

Dated, Delivered and Signed at Kerugoya this 4th Day of February, 2021.

J. N. MULWA

JUDGE