



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E061 OF 2021**

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

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF TRADE MARKS ..... RESPONDENT**

**AND**

**KAAB INVESTMENTS LIMITED.....INTERESTED PARTY**

**EX PARTE APPLICANT:.....UNITED MILLERS LIMITED**

**RULING**

**The Application**

1. United Millers Limited, the *ex parte* Applicant herein, has filed an application by way of a Chamber Summons dated 28<sup>th</sup> April 2021, seeking the following orders:

1. **THAT this application be certified urgent, and be heard on priority basis**
2. **THAT this Court be pleased to grant to the Applicant leave to apply for orders of Certiorari and Mandamus in terms of the Statement of even date with this Application lodged herein.**
3. **THAT the grant of leave do operate as a stay, and suspension of the decision, order and action of the Registrar of Trade Marks deregistering and removing from the Register of Trade Marks the Applicant's Trade Mark, namely "Jambo Maize flour", registered as Trade Mark number 18796 under class 512 (Nice Classes), and any acts and/or proceedings arising therefrom or pursuant thereto**
4. **THAT service of this application and the Substantive application upon the Respondents be by way of advertisement in any of the daily newspaper with circulation due to the ongoing Covid-19 Pandemic.**
5. **THAT the costs of this application do follow the cause.**

2. The orders sought in the *ex parte* Applicant's statutory statement dated 28<sup>th</sup> April 2021 are the following:

1. **THAT an order of certiorari to remove into this Court for the purposes of quashing the decision of the Registrar of Trade Marks to deregister and/ or to remove from the Register of Trade Marks the Applicant's Trade Mark, namely "JAMBO**

MAIZE MEAL", consisting both a name and logo, registered as number 18796.

2. THAT an order of certiorari to remove into this Court for the purposes of quashing the decision of the Registrar of Trade Marks to register to the benefit and use of the Interested Party, the name and Trade Mark, namely "JAMBO MAIZE FLOUR", registered in the Registrar of Trade Marks as Trade Mark Number 86717.

3. THAT this Honourable Court be pleased to issue an order of mandamus to issue against the Respondent, compelling it to reinstate and renew the Applicant's registration of its Trade Mark Number 18796, and the certificate of registration therefor.

4. THAT this Honourable Court be pleased to issue an order of prohibition prohibiting the Respondent and the Interested Party herein jointly and/ or singularly from further transferring and/or registering using the said Trade Mark together with the logo and any acts and/ or proceedings arising therefrom or pursuant thereto pending the hearing of this suit.

5. THAT the costs of this Application be provided for..

3. The grounds for the application are stated in the *ex parte* Applicants' statutory statement dated 28<sup>th</sup> April 2021, and a verifying and supporting affidavit sworn on the same date by Alfred Xavier, the *ex parte* Applicant's Managing Director.

4. In summary, the *ex parte* Applicant averred that it purchased the Trade Mark, namely "JAMBO MAIZE MEAL", consisting both a name and logo, registered as number 18796 from the previous registered proprietor/user on 6th July 1979, and renewed and maintained the use of the said trade Mark over the period between 1979 to 2014 . However, that the Respondent has since illegally and/ or unprocedurally caused the said Trade Mark and Logo to be removed from the register of trademarks and subsequently registered in favour of the Interested Party herein to the detriment of the Applicant .

5. The *ex parte* Applicant stated that it did not, and has never received any communication, information or notification from the Registrar of Trade Marks prior to removal of its registered Trade Mark herein or whatsoever at all, and that the unlawful removal of the Applicants registered Trade Mark, and subsequent registration of the same in favour of the Interested party herein has occasioned, and continues to occasion upon it immense loss, harm and damage. Lastly, that the Respondent has neither taken any action nor issued any acknowledgement or communication regarding the *ex parte* Applicant's complaint on the removal of its registered Trade Mark.

6. Therefore, that the *ex parte* Applicant's rights to fair administrative action have been contravened, and that its rights, benefits and legitimate expectation, accruing to the protection of registration and use of its Trade Mark afforded; and the prescribed procedure upon expiry of registration provided under the Trade Marks Act have been breached by the Respondent.

7. The *ex parte* Applicants annexed copies of its registered Trademark and logo; of its application for the renewal of the said Trademark and logo; of correspondence with, and its complaint dated 15<sup>th</sup> October 2020 to the Respondent; and of the search results of the said Trademark and logo.

#### **The Determination**

8. I have considered the application dated 28<sup>th</sup> April 2021 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicants have demonstrated that this matter is urgent. This for reasons of the economic harm likely to be caused to the *ex parte* Applicant by the Respondent's impugned action.

9. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

10. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in this respect in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

11. In the present application, the *ex parte* Applicant has provided evidence of the registration of its Trademark and logo, of the registration of the same in the Interested Party by the Respondent, and of its complaint to the Respondent, and has averred as to the grounds and reasons why it considers the Respondent's decision to be illegal. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

12. On the question of whether the said leave can operate as a stay of the summons, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

**"The grant of leave under this rule to apply for an order of prohibition or an 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."**

13. I am guided by the exposition on the purpose of a stay in **R (H.) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

14. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

15. These positions were also explained in the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**, **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995**, **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

16. In the present application, I note that the trademark was registered in favour of the Interested Party on 18<sup>th</sup> March 2015, and therefore there has been considerable implementation of the Respondent's decision, and there may be prejudice suffered by the Interested Party if the stay orders are granted. To balance the interest of all the parties, it is prudent that the current *status quo* obtains pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion. The stay orders are therefore not merited for this reason.

17. Lastly, I also note that the *ex parte* Applicant has sought orders to serve the parties by way of advertisement, due to the COVID pandemic. However, given that the movement restrictions due to the COVID pandemic have been lifted, and there are safety guidelines in place to be observed, there is no limitation to physical service. In addition, given the nature of the *ex parte* Applicant's claim, physical service of its pleadings will be necessary.

### **The Disposition**

18. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 28<sup>th</sup> April 2021 is found to be merited to the extent of the following orders:

**I. The *ex parte* Applicants' Chamber Summons application dated 28<sup>th</sup> April 2021 is hereby certified as urgent, and is hereby admitted for hearing *ex parte* in the first instance.**

**II. The *ex parte* Applicant is granted leave to apply for an order of certiorari to remove into this Court for the purposes of quashing the decision of the Registrar of Trade Marks to deregister and/ or to remove from the Register of Trade Marks the Applicant's Trade Mark, namely "JAMBO MAIZE MEAL", consisting both a name and logo, registered as number 18796.**

**III. The *ex parte* Applicant is granted leave to apply for an order of certiorari to remove into this Court for the purposes of quashing the decision of the Registrar of Trade Marks to register to the benefit and use of the Interested Party, the name and Trade Mark, namely "JAMBO MAIZE FLOUR", registered in the Registrar of Trade Marks as Trade Mark Number 86717.**

**IV. The *ex parte* Applicant is granted leave to apply for an order of mandamus against the Respondent, compelling it to reinstate and renew the Applicant's registration of its Trade Mark Number 18796, and the certificate of registration therefor.**

**V. The *ex parte* Applicant is granted leave to apply for an order of prohibition prohibiting the Respondent and the Interested Party herein jointly and/ or singularly from further transferring registering, and/or using the said Trade Mark together with the logo and any acts and/ or proceedings arising therefrom .**

**VI. The costs of the *ex parte* Applicant's Chamber Summons application dated 28<sup>th</sup> April 2021 shall be in the cause.**

**VII. The *ex parte* Applicant shall file and serve the Respondent and Interested Party with (i) the substantive Notice of Motion (ii) the Chamber Summons dated 28<sup>th</sup> April 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.**

**VIII. Upon being served with the said pleadings and documents, the Respondents and Interested Party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.**

**IX. A virtual hearing of the *ex parte* Applicant's substantive Notice of Motion shall be held on 28<sup>th</sup> June 2021 at 3.00pm.**

**X. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.**

**XI. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system,**

and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system

XIV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 28<sup>th</sup> June 2021 at 3.00pm and shall send the parties an electronic link for the mention.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the *ex parte* Applicant by electronic mail by close of business on Monday, 10<sup>th</sup> May 2021.

XVI. Parties shall be at liberty to apply.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2021

P. NYAMWEYA

JUDGE