



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E014 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK,

FISHERIES AND COOPERATIVES.....1ST RESPONDENT

AGRICULTURAL FOOD AND FISHERIES

AUTHORITY.....2ND RESPONDENT

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

AND

JACOB KAMAU KAHIU.....1ST INTERESTED PARTY

IRUNGU NYAKERA.....2ND INTERESTED PARTY

MANGARER LANGA.....3RD INTERESTED PARTY

FREDRICK MUTHURI MURIITHI.....4TH INTERESTED PARTY

JOHN KAMAU.....5TH INTERESTED PARTY

DAVID CHOMBA GACHOKI6TH INTERESTED PARTY

CATHERINE NYAMBOKE MOGENI (Mrs.).....7TH INTERESTED PARTY

WANJA Y. MICHUKI (Ms.).....8TH INTERESTED PARTY

WACHIRA MAINA9th INTERESTED PARTY

PERIS WATAU MUDIDA (Ms.).....10TH INTERESTED PARTY

EX PARTE:

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED

RULING

The Application

1. The Kenya Tea Development Agency Holdings Limited, the *ex parte* Applicant herein, is aggrieved by the decision made by the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries And Cooperatives, the 1st Respondent herein, to appoint a National Steering Committee on the Implementation of Tea Reforms in Kenya vide Gazette Notice Number 4469 dated 25th June, 2020. The mandate of the said National Steering Committee on the Implementation of Tea Reforms is to *inter alia*, manage and co-ordinate processes and implementation of the tea sector reforms, including changes on the role of the *ex parte* Applicant in the management of small scale tea growers.

2. The 1st to 10th Interested Parties were appointed by the 1st Respondent as the members of the said National Steering Committee by the said Gazette Notice, while the Agricultural and Food Authority, the 2nd Respondent herein, is to fund and facilitate the Committee.

3. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 9th July 2020, seeking the following orders:

(a) THAT the instant application be certified as urgent and fit to be heard ex-parte in the first instance.

(b) THAT the Applicant be granted leave to seek judicial review orders to wit:-

i. An order of Certiorari to remove into this Court and quash the Gazette Notice No. 4469 dated 25th June, 2020 issued by the 1st Respondent.

ii. An order of Prohibition directed towards the 2nd Respondent by itself, its agents, employees and or any other person(s) whomsoever or howsoever acting on, with and or under its instructions, prohibiting it from utilizing any public resources/ funds in furtherance and or execution of the Gazette Notice No. 4469 of 25th June, 2020 and or taking any action in compliance with the Gazette Notice No. 4469 of 25th June, 2020.

iii. An order of Prohibition directed towards the 1st and 2nd Respondent by themselves, their agents, employees and or any other person(s) whomsoever or howsoever acting on, with and or under their instructions, prohibiting them from appointing the 1st to 10th Interested Parties herein and or any other person(s) with a view to unlawfully interfere with the structure, operation, affairs and business of the Applicant.

(c) THAT the leave granted herein, pending the hearing and determination of the substantive judicial review proceedings, do operate as stay of implementation and or further implementation of the impugned Gazette Notice No. 4469 dated 25th June, 2020.

(d) THAT costs of this application be borne by the Respondents.

4. The application is supported by a statutory statement dated 9th July 2020, and a verifying and supporting affidavit sworn on the same date by Dr. John Kennedy Omanga, the *ex parte* Applicant's Group Company Secretary. In summary the grounds for the application are as follows:

(a) The *ex parte* Applicant is a private company and the 1st Respondent has no legal right to seek to cause changes on its business operations.

(b) Some of the persons appointed in the National Steering Committee on the Implementation of Tea Reforms in Kenya have publicly pronounced themselves adversely against the Applicant, have cases in Court on matters relating to the operations of the Applicant, and others others have broken contractual relationship with the Applicant. Therefore that the said Committee members have not only openly disclosed open bias against the *ex parte* Applicant but they are so conflicted and unfit to preside over any issues relating to the Applicant.

(c) The 1st Respondent did not cite any law that empowered him to appoint such a Committee, as indeed no such law exists.

(d) The 1st Respondent has directed public funds vested to the 2nd Respondent to be spent on an amorphous illegal entity in the form of the said Committee, and has acted *ultra vires* as no law grants him power to appropriate public funds vested to the 2nd Respondent.

5. The *ex parte* Applicant annexed a copy of the Gazette Notice Number 4469 dated 25th June, 2020, as well as various correspondence, newspaper reports and court documents in support of the averments made about some of the members of the said National Steering Committee on the Implementation of Tea Reforms in Kenya.

The Determination

6. I have considered the application dated 9th July 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent in light of the intended reforms to the tea sector and the *ex parte* Applicant to be undertaken by the National Steering Committee on the Implementation of Tea Reforms in Kenya, which has already been established.

7. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law on leave 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.

8. 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 court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In the present application, the *ex parte* Applicants have provided evidence of the impugned Gazette Notice Number 4469 dated 25th June, 2020, setting up the National Steering Committee on the Implementation of Tea Reforms in Kenya, including its membership and terms of reference. Also annexed is evidence of the alleged bias by some of the Committee members to the *ex parte* Applicant. Lastly, the *ex parte* Applicant has also averred as to the grounds and reasons why it considers the 1st Respondent's action and decision to appoint a National Steering Committee on the Implementation of Tea Reforms in Kenya to be *ultra vires*.

9. 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 Respondent.

10. On the question of whether the said leave can operate as a stay of the impugned report, 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.”

11. In **R (H.) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, 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. 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.

12. 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. See in this regard 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**.

13. In the present application the National Steering Committee on the Implementation of Tea Reforms in Kenya was established by the impugned Gazette Notice Number 4469 on 25th June 2020, and its tenure is for four months. Its implementation is thus of a continuing nature, and unless the *status quo* is maintained, the *ex parte* Applicant's case may be rendered nugatory, in light of the limited implementation period set for the said Committee. The stay order sought by the *ex parte* Applicant is therefore merited to this extent.

The Orders

14. In light of the foregoing observations and findings, the *ex parte* Applicant's Chamber Summons dated 9th July 2020 is found to be merited. I accordingly grant the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 9th July 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* at the first instance.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove into this Court and quash the Gazette Notice No. 4469 dated 25th June, 2020 issued by the 1st Respondent.

III. The *ex parte* Applicant is granted leave to apply for an order of order of Prohibition directed towards the 2nd Respondent by itself, its agents, employees and or any other person(s) whomsoever or howsoever acting on, with and or under its instructions, prohibiting it from utilizing any public resources/ funds in furtherance and or execution of the Gazette Notice No. 4469 of 25th June, 2020 and or taking any action in compliance with the Gazette Notice No. 4469 of 25th June, 2020.

IV. The *ex parte* Applicant is granted leave to apply for an order of order of Prohibition directed towards the 1st and 2nd Respondent by themselves, their agents, employees and or any other person(s) whomsoever or howsoever acting on, with and or under their instructions, prohibiting them from appointing the 1st to 10th Interested Parties herein and or any other

person(s) with a view to unlawfully interfere with the structure, operation, affairs and business of the Applicant.

V. The leave so granted herein to institute these judicial review proceedings shall operate as a stay of implementation, and/or further implementation of the impugned Gazette Notice No. 4469 dated 25th June, 2020, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or further orders by this Court.

VI. The costs of the Chamber Summons dated 9th July 2020 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondents and Interested Parties with the substantive Notice of Motion and submissions thereon, and shall also serve the Respondents and Interested Parties with the Chamber Summons dated 9th July 2020 and its supporting documents, a copy of this ruling, and a mention notice, within twenty-one (21) days from today's date.

VIII. Upon being served with the said pleadings and documents, the Respondents and Interested Parties shall be required to file their responses to the substantive Notice of Motion and submissions thereon within twenty-one (21) days from the date of service by the *ex parte* Applicant.

IX. This matter shall be mentioned on 21st September 2020 for further directions.

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 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 and asunachristine51@gmail.com.

XII. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the description of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XIII. 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 with copies to asunachristine51@gmail.com.

XIV. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Friday, 10th July 2020.

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 21st September 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVII. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2020

P. NYAMWEYA

JUDGE