

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 160 “B” OF 2018

In the matter of Articles 3,10,27,40 and 47 of the Constitution

and

In the matter of sections 8 and 9 of the Law Reform Act, Cap 26, Laws of Kenya

and

In the matter of order 53 of the Civil Procedure Rules

-Between-

Republic.....Applicant

-and-

The Nairobi Coffee Exchange.....1st Respondent

The Agriculture and Food Authority.....2nd Respondent

The Hob. Attorney General.....3rd Respondent

and

Kenya Planters Co-operative Union Limited.....Ex parte Applicant

JUDGMENT

Introduction.

1. The *ex parte* applicant seeks an order of *mandamus* to compel the Respondents jointly and severally, their agents, servants and or employees, pursuant to Regulation 21 of the Coffee (General) Regulations, 2016, to, immediately grant it access to the Nairobi Coffee Exchange for the purposes of trading Coffee.

Factual Matrix.

2. The *ex parte* applicant states that the High Court in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others ex parte Council of County Governors & Another*^[1] declared the Coffee (General) Regulations, 2016 unlawful. The *ex parte* applicant also states that the court held that the greater good would be served by keeping the regulations in place to ensure stability in the Coffee Sector, while allowing the relevant agencies time to rectify the defects in the regulations through a court-supervised interdict. It contends that as per the said judgment, the said Regulations are in force.

3. The *ex parte* applicant further states that a consent was recorded on 10th October 2017 in the said case, after which the second Respondent granted the *ex parte* applicant a licence. It states that with the license, it approached the first Respondent seeking access to the Nairobi Coffee Exchange, the mechanism established and regulated by the second Respondent for the sale of coffee both locally and internationally. However, the first Respondent in disregard of the law declined to grant it access on grounds that it had not been notified of the change of the law by the second and third Respondents, and, that, it was operating under the Coffee (General) Rules, 2002, hence, it could not grant the request.

Legal foundation of the application.

4. The *ex parte* applicant contends that the acts complained of violate Articles 3(1), 10, 27, 40, and 47 of the Constitution.

Respondent’s grounds of opposition

5. The Hon. Attorney General filed grounds of opposition stating *inter alia* that the application is defective and that the *ex parte* applicant is not qualified to participate in the Nairobi Stock Exchange since it lacks Marketing Agents License pursuant to Rule 31 (1) of the (Nairobi) Coffee (Exchange Trading) Rules, 2012.

6. It also stated that the *ex parte* applicant does not qualify for the issuance of the Marketers License pursuant to the Coffee (General) Regulations 2016 which are not yet in force, and, that, the court in JR No. 291 of 2016 ordered the second Respondent to carry out a qualitative and quantitative stakeholder engagement, which had just been concluded. In addition, it stated that under the Coffee Regulations 2012, for the *ex parte* applicant to be issued with a Marketing Agent's License, it must submit a Bank guarantee worth Ksh. 1 Billion, which it had not, which is a requirement to secure farmers from non-payment of their dues. Thus, allowing the *ex parte* applicant to participate would be illegal.

***Ex parte* applicant's further Affidavit.**

7. Andrew Wachira Gichu, the *ex parte* applicant's Managing Director swore the Replying Affidavit dated 15th June 2018. He averred that the 2016 Regulations removed the requirement for a Marketers Licence, a position which was restated by the court in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others ex parte Council of County Governors & Another*.^[2] In addition, he averred that the Coffee General Regulations 2016 removed the requirements for a Bank guarantee.

Determination

8. Upon analysing the facts presented by the Parties, I find that the only issue for determination is whether the *ex parte* applicant has established any grounds for the court to grant the order of *Mandamus*.

9. The *ex parte* applicant's counsel submitted that after the judgement in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others ex parte Council of County Governors & Another*,^[3] the parties recorded a consent in the said case on 10th October 2017. He contended that after the consent, the Second Respondent considered the *ex parte* applicant's license, but, after it obtained the licenses, the first Respondent declined to grant it access to the Nairobi Coffee Exchange for the purposes of trading Coffee.

10. He submitted that the application is premised on Articles 23 and 47 of the constitution and relied on *Republic v Inspector General of Police and Another ex parte Patrick Macharia Nderitu*,^[4] *Pasoli v Kabale District Local Government and Others*^[5] and *Republic v Medical Practitioners and Dentists Board and two Others ex parte Luv Biren Shah and Another*.^[6] He contended that the acts complained of are discriminatory and that they violate Articles 3, 10, 27, 40 and 47 of the Constitution. Citing *Republic v Commissioner of Lands ex parte Kithinji Murugu*,^[7] he argued that based on the above grounds, an order of *Mandamus* is merited.

11. The Respondent's counsel cited *Pastoli v Kabale District Local Government Council and Others*^[8] and submitted that the applicant has not made out a case to warrant the orders of *Mandamus*. He contended that the *ex parte* applicant failed to provide a bank guarantee as required by the Regulations. Citing *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji and 9 Others*^[9] among other decisions, he submitted that the respondent does not owe any specific duty to the applicant in the manner and style portrayed in the pleadings, hence, *Mandamus* cannot issue.

12. Judicial Review Remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Judicial review is the procedure used by the courts to supervise the exercise of public power. It is a means by which improper exercise of such power can be remedied and it is therefore an important component of good public administration.^[10]

13. On the question whether the *ex parte* applicant has demonstrated grounds to warrant the order sought, the applicant's counsel relied on the pleadings, the authorities cited and placed heavy reliance on the decision rendered in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others ex parte Council of County Governors & Another*.^[11] I find it useful to reproduce the final orders granted by the court in the said case. These are:-

a. A declaration that *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016 are unlawful.

b. An order compelling the 1st Respondent to ensure that lawful regulations are promulgated within 30 days of the first sitting of the next Parliament.

c. In default of compliance, an order of Prohibition shall be issued directed against the 1st and 2nd Respondents, prohibiting them and their agents, employees and servants from implementing *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016.

d. In further default, an order of Certiorari shall issue removing into this Court for purpose of quashing and quashing *The Coffee (General) Regulations, 2016* published as Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June 2016.

e. Additionally, and in default an order of Certiorari shall issue to quash the report of National Task Force on Coffee Sub-Sector Reforms contained in Kenya Gazette Notice supplement Notice No. 105, legislative supplement No. 49, legal notice No. 120 Gazetted on 27th April 2016.

f. Similarly, in default an order of Prohibition to prohibit the 1st, 2nd and 3rd Respondents implementing a report of National Task Force on Coffee Sub-Sector Reforms, contained in Kenya Gazette Supplement Notice No. 105, Legislative Supplement No. 49, Legal Notice No. 120. Gazetted on 27th April 2016.

g. As this was a public interest litigation, there will be no order as to costs.

14. A reading of the above orders leaves no doubt that the court did not compel the Respondents to grant the applicant access to the Nairobi Coffee Exchange for the purposes of trading coffee. The court merely ordered that new Regulations be enacted within the stipulated period. The *ex parte* applicant also contends that as per the said judgment, the said Regulations are in force. I find nothing in the courts orders decreeing which Regulations would remain in force. In addition, the *ex parte* applicant's counsel contends that the 2016 Regulations removed the requirement for a Marketers Licence, a position which he said was restated by the court in the said case. I have reproduced the final orders in the said case. I find nothing to support the contention. In any event, the said Regulations were nullified by the court, so the *ex parte* applicant cannot on one hand, insist they were invalidated by the court, and on the other hand seek to rely on one aspect of the same Regulations.

15. The *ex parte* applicant argues that subsequent to the above judgement, on 10th October 2017, a consent order was recorded in the said case to the effect that the Respondents were asked to consider the *ex parte* applicant's application for the relevant licenses under the Coffee (General) Regulations, 2016. I have perused the court file. The record reads: - "let the matter be stood over to 25/10/17 for further orders. In the meantime, prayer 4 in the Motion dated 26th September 2017 is granted till further orders."

16. Prayer 4 of the application dated 26th September 2017 reads as follows:- "That this Honourable Court be pleased to suspend the computation of time in respect to the 30 days pending the hearing and determination of this application." A reading of the entire application shows that the extension sought was for the period for complying with order 2 of the judgment. The record further shows that on 17th January 2017, the court extended the said order by a further period of 10 days. The order does not show that the Respondents were required to consider the *ex parte* applicant's license. To the extent that the core ground relied upon by the *ex parte* applicant is the alleged consent, which does not exist, this renders this application legally fragile. In addition, I find baffling the *ex parte* contends that the Respondent was asked to consider its license under the 2016 Regulations which it also argues were nullified by the court. How could the court nullify the Regulations and at the same time direct the Respondents to consider its license under the same Regulations. This argument lacks substance and cannot be sustained.

17. The *ex parte* applicant seeks an order of *Mandamus* to compel the Respondents to grant it access to the Nairobi Coffee Exchange for the purposes of trading coffee. An order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.^[12] Heavy reliance was placed on the existence of the consent order and the judgment in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others ex parte Council of County Governors & Another*.^[13] I have herein above reproduced the final orders of the court and the orders made on 10th October 2017. The court did not order the *ex parte* applicant be granted access to the access to the Nairobi Coffee Exchange for the purposes of trading Coffee as alleged.

18. It is true, the court gave the parties the chance remedy the situation in the following words:-

146. In this case to immediately declare the Regulations invalid would have the effect of exposing Kenyans who rely on the coffee industry such as farmers, marketers, millers, etc, to a state of uncertainty.

147. Therefore there may be occasions where despite breaches and infractions of the law, the principle of proportionality ought to be adopted so as to give the relevant authorities a chance to remedy the defects rather than to adopt a course by which the public is thereby imperilled

19. There is nothing in the above orders to show that the *ex parte* applicant was to continue having access to the Nairobi Coffee Exchange for the purposes of trading Coffee as alleged. To impute otherwise as the *ex parte* applicant suggests would amount to misconstruing the court judgment. The final orders reproduced above are very clear.

20. *Mandamus* is a judicial command requiring the performance of a specified duty, which has not been performed. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.^[14]

21. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles.

22. The test for *mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,^[15] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[16] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. *There must have been:*

I. *A prior demand for performance;*

II. *A reasonable time to comply with the demand, unless there was outright refusal; and*

III. *An express refusal, or an implied refusal through unreasonable delay;*

(iv) *No other adequate remedy is available to the Applicants;*

(v) *The Order sought must be of some practical value or effect;*

(vi) *There is no equitable bar to the relief sought;*

(vii) *On a balance of convenience, mandamus should lie.*

23. This is a case where the *ex parte* applicant is relying on a court judgment and a consent order. I have reproduced the final judgement and the alleged consent. Neither, did the judgment nor the consent order expressly require the Respondents to grant the *ex parte* applicant access to the Nairobi Coffee Exchange for the purposes of trading Coffee. The *ex parte* applicant is under a duty to demonstrate that the Respondents have a duty to grant it access as alleged. It has a burden of establishing breach of the duty. There is no evidence to prove the existence of such a duty or breach of the duty nor do I find any.

24. The *ex parte* applicant seeks an order of *mandamus* to compel the Respondents jointly and severally, their agents, servants and or employees, pursuant to Regulation 21 of the Coffee (General) Regulations, 2016, to, immediately grant it access to the Nairobi Coffee Exchange for the purposes of trading Coffee. This prayer is anchored on Regulation 21 of the same Regulations, which were nullified by the court. How can the same Regulation be a basis for the order of *mandamus*. This position renders the *ex parte* applicants prayer legally unsustainable.

25. Even if the same Regulations were in force, which not the case, Regulation 21 of the Coffee (General) Regulations, 2016 reads as follows:-

21. (1) *Kenya Coffee shall be traded through-*

(a) *auction at the Exchange; and*

(b) *direct sales: Provided that-*

(a) *the prices offered at the direct sales shall bear a favourable comparison to those offered by the Exchange; and*

(b) *the exchange shall set aside one day in every fortnight for the trading of coffee by local traders.*

(2) *The Authority shall set up a Pricing Committee comprising of seven members drawn from the National and county governments and the Exchange to propose indicative coffee prices based on the prices prevailing at the Exchange and in the international market and on the quality of coffee from the various coffee growing regions in the country by the Exchange;*

26. As stated above, these are the same Regulations, which were impugned by the court. This extinguishes the *ex parte* applicants ground. That notwithstanding, the above Regulation only provides for coffee marketing. It does not confer unconditional access to the *ex parte* applicant to the market. Any conditions to participate in the market including the requirement for guarantee would apply unless expressly excluded by the Regulations.

27. Additionally, *Mandamus* is a remedy of last resort. It is granted in exceptional circumstances, and, where an applicant has no other remedy. It has not been shown that this is the most efficacious remedy in the circumstances of this case. The dispute before this court is simple. It is whether the Respondents have breached a legal duty to the *ex parte* applicant. It is not about which regulations are applicable. I find no breach of duty on the party of the Respondents nor has the *ex parte* applicant demonstrated any.

28. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable. The *ex parte* applicant based its case on a non-existent consent order. Judicial Review orders can be refused where the applicant has acted in bad faith or unreasonably. In this case, it was an act of bad faith for the *ex parte* applicant to misconstrue the consent order.

29. In addition, the court will decline to exercise discretion in favour of an applicant where a remedy would impede the authority's ability to deliver fair administration, or perform its functions. Since the grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary, the court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders.

30. It is my view that the nature and circumstances of the decision fall into the category of areas, which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the *Wednesbury* principles of '*illegality*', '*irrationality*' and '*impropriety*', if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

31. The test of reasonableness is not applied in a vacuum but in the context of life's realities. I do not think it would be reasonable for the court to compel the Respondents to grant access to the *ex parte* applicant in violation of their Regulations. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to decisions formulated by other bodies possessing the expertise and experience of actual day-to-day working of their institutions/bodies.

32. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to a problem of this nature, isolated from the actual reality and circumstances of the case. In essence, the court must engage in a balancing exercise, arrive at a global judgment on proportionality, and not adhere mechanically to a sequential checklist. Further, the court should not lose sight of the ultimate values to be protected, that is, stability in the industry. There is a compelling need to ensure that the coffee trade is undertaken within the confines of the law, and in this regard, the court notes that there exists a court determination pursuant to which new Regulations are being formulated. This court must be careful not to make a determination that may conflict with the new Regulations if promulgated or render them unworkable or even impede the progress made so far (if any) of making the Regulations. Differently stated, the court should be careful not to render a determination that may impede the implementation of a court judgment, which parties embraced and embarked on compliance. The court will have failed in its duty by failing to exercise its discretion properly and weigh the pros and cons of granting such an order.

33. In view of my analysis herein above, I find and hold that this is not a proper case for the court to grant the Judicial Review Order of *Mandamus*. Even if the applicant had established any grounds (which it has not), the court would have been reluctant to exercise its discretion in its favour in view of the circumstances of this case. The upshot is that the *ex parte* applicant's application dated 17th April 2018 is dismissed with no orders as to costs.

Signed, Delivered and at Nairobi this 22nd day of May, 2019.

John M. Mativo

Judge

[1] {2017} e KLR.

[2] Ibid.

[3] Ibid.

[4] JR No. 130 of 2013 {2014}e KLR

[5] {2008} 2 EA 300.

[6] {2013} e KLR.

[7] {2012} e KLR.

[8] {2008} 2 EA 300.

[9] Civil Appeal No. 266 of 1996.

[10] Andrew Le Sueur and Maurice Sunkin, *Public Law* 1 (ed) (1997) Longman, London, page 466.

[11] *Supra*.

[12] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[13] *Supra*.

[14] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[15] [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

[16] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

