



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JUDICIAL REVIEW NO. 05 OF 2019

(CORAM: CHERERE-J)

IN THE MATTER OF CIVIL PROCEDURE RULES, 2010 AND

IN THE MATTER OF SECTIONS 3, 4, 6, 7, 10(1), 11 AND 12 OF THE ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015 AND

**IN THE MATTER OF ARTICLES 10, 22, 23 (3) (F), 47, 48, 50 AND 159 OF THE CONSTITUTION OF KENYA AND IN THE
MATTER OF SECTION 8 AND 9 OF ETH LAW REFORM ACT CAP 26 LAWS OF KENYA BETWEEN**

EQUATOR BOTTLERS LIMITED.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF KISUMU..... RESPONDENT

RULING

Background

1. By a letter dated 13th March, 2019, the Respondent's Director of Public Health notified the Applicant of foreign particles in its Fanta Orange products. The letter gave notice that the entire Fanta Orange was to be removed from the market pending further investigations.

JUDICIAL REVIEW NO. 05 OF 2019

2. In a response dated 13th March, 2019, the Applicant through its manufacturing Manager Mr. Kevin Akoko requested the Respondent to only seize the alleged affected lot or sample and let the outlets continue with normal business until further investigations are concluded.

3. By a letter dated 19th February, 2019, the Respondent's County Public Health Officer requested the Respondent's Director of Public Health to only seize the affected batch.

4. By summons dated 21st March, the Applicant's Managing Director to attend court on 6th April, 2019 to answer to charges of offering unwholesome food for sale with foreign matter inside contrary to section 3 (c) as read with Section 36(1) A of the Food, Drugs and Chemicals Substances Act Cap 254 Laws of Kenya.

5. The summons prompted the Applicant to file the chamber summons dated 05th April, 2019 seeking orders **that:**

a). Leave do issue to the Applicant to apply for an order of CERTIORARI to remove into this court and quash the letter by the Respondent dated 13th March, 2019 authorizing seizure of Applicant's product from the market

b). An order of CERTIORARI to apply for an order of certiorari to remove into this court and quash the summons dated 21st March, 2019 by the Respondent requiring the attendance of the Applicant's managing director in the Resident

Magistrate's court at Kisumu on 16th April, 2019

c). An order of PROHIBITION directed at Respondent from undertaking further seizure of Applicant's products or any other interference with the Applicant's lawful operations

2. That the leave so granted to operate as a stay of proceedings

3. Costs be provided for

6. The Respondent by a replying affidavit sworn by its Director of Public Health OSBON ODERO on 22nd October, 2019 avers that it acted lawfully and that a stay order will expose the public to health hazards and interfere with the Respondent's operations.

Determination

7. I have considered the application, the grounds, affidavit in support, annexures and the respondent's replying affidavit.

8. I have also considered the parties' advocates oral submissions in support of their client's respective positions.

9. Order 53 Rule 1(4) of the Civil Procedure Rules stipulate:

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.

10. Whether or not to grant stay in Judicial Review proceedings is an exercise of judicial discretion by the court, based on the circumstances of each case.

11. Stay is not a matter of course. The party seeking for a stay must demonstrate to the satisfaction of the court that unless stay is granted, then the applicant shall, at the end of the day, if successful in his main motion, be rendered a mere pious explorer in the judicial process.

12. In the case of **Taib A. Taib vs Minister for Local Government & Others Mombasa HC Miscellaneous Application 158 of 2006** Maraga J (as he then was) stated:

".....it is only where the imminent outcome of the decision challenged is likely to render the success of the Judicial Review nugatory or an academic exercise that the court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."

13. In **R.H. V Ashworth Hospital Authority [2003] WLR 127 at 138** Lord Dyson LJ stated, inter alia that:

".....The purpose of a stay in a Judicial Review proceedings is clear. It is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the Judicial Review process and make it more effective. It will ensure that so far as possible, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success....."

The administrative court routinely grants stay to prevent the implementation of a decision that has been made but not yet carried out into effect or fully carried into effect."

14. From the above decisions, it is clear that it is not in every case that there is a prima facie arguable case that the court will grant stay in Judicial Review proceedings.

15. Even where leave is granted to apply for Judicial Review orders, the law is clear that in considering whether the said leave ought to operate as a stay of proceedings, the court has to be careful in what it states lest it touch on the merits of the main application for Judicial Review and that where the application raises important points deserving determination by way of Judicial Review it cannot be said to be frivolous. This is the principle espoused in **Jared Benson Kangwana V Attorney General Nairobi**

HCC 446/95.

16. The applicant must show that the probability of a determination being made in the challenged proceedings are high and such probability cannot be said to have been achieved on a mere conjecture and speculation.

17. The Applicant does not dispute that its products were contaminated as alleged by the Respondents but challenges the Respondents action to seize the entire Fanta Orange thereby removing it from the market.

18. What emerges from the arguments of all the parties is whether the Respondent had other powers which it could have exercised before ordering seizure of the entire Fanta Orange products on the basis of a complaint which had not been investigated prior to the seizure of the product.

19. There is no evidence that the Respondent's first port of call is to **seize the goods**. It could therefore first ***have tested he products*** to establish whether there was reasonable ground to believe that the entire Fanta Orange products was contaminated.

20. Where there is a serious allegation of breach of rules of natural justice and the alleged violator takes such a casual approach to the allegation, this court exists to protect such rights and interests of those whose rights and interests are violated. In such cases, it is appropriate to stay the alleged violation in order for the applicants not to be rendered pious explorers in the judicial process.

21. Stay is only appropriate to restrain a public body or administrator from acting and to prohibit further decision making process if it has not yet been completed, being taken by a public body; and the implementation of the decision of such body if it has been taken. This is what Order 53 Rule 1(4) of the Civil Procedure Rules stipulate. It is for the above reasons that I find that the Applicant herein has made out a case for stay at this stage.

22. Whether the goods for which the summon dated 21st March, 2019 were issued were or were not contaminated is a matter which the magistrate's court has jurisdiction to determine. The Respondent has a duty to protect the public from exposure to health hazards and an order of staying its operations would therefore not be in public interest.

23. Accordingly, it is hereby ordered:

a) Leave do issue to the Applicant to apply for an order of CERTIORARI to remove into this court and quash the letter by the Respondent dated 13th March, 2019 authorizing seizure of Applicant's product from the market

b) For the foregoing reasons, the leave so granted shall not operate as a stay of proceedings

c) The Applicant has 21 days from the date hereof, to file the substantive application

DATED AND SIGNED THIS 11th DAY OF December, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant -

Applicant -

Respondent -