REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 10 OF 2018

FRESHCO INTERNATIONAL LIMITED.....1ST APPLICANT

JAMES GIGHANGA KARANJA.....2ND APPLICANT

VERSUS

KENYA PLANT HEALTH INSPECTORTE .

SERVICES (KEPHIS).....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, NAKURU.....3RD RESPONDENT

RULING

1. The *Ex Parte* Applicant herein approached the Court on 02/05/2018 under Certificate of Urgency seeking the following prayers:

> ***1)****THAT the Applicants herein be and are hereby granted leave to apply for an Order of Certiorari to remove to this Court and to quash the entire criminal case and the entire proceedings in* ***Nakuru Chief Magistrate's Court Criminal Case NO. 900 of 2018, Republic – Vs- James Gichanga Karanja.***
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> ***2)*** *THAT the Applicants herein be and are hereby granted leave to apply for an ORDER OF Prohibition to prohibit the 2nd and 3rd Respondents herein being the* ***Director of Public Prosecutions (DPP)*** *and the* ***Chief Magistrate's Court, Nakuru****, from prosecuting, hearing, trying or taking any further proceedings whatsoever in the said case* ***Nakuru Chief Magistrate's Court Criminal Case No. 900 of 2018, Republic –Vs- James Gichanga Karanja.***
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> ***3)*** *THAT the grant of leave above do operate as a stay of all proceedings in the said case* ***Nakuru chief Magistrate's Court Criminal CaseNO. 900 of 2018, Republic – vs- James Gichanga Karanja.***
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> ***4)*** *THAT the Applicants herein be and are hereby granted leave to apply for an Order of Certiorari to remove to this Court and to quash the entire decision and action of the 1st Respondent* ***Kenya Plant Health Inspectorate Service (KEPHIS)*** *dated* ***03/04/2018*** *of Revocation of the 1st Applicant* ***Freshco International Limited's*** *Seed Merchant License.*
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> ***5)*** *THAT the Applicants herein be and are hereby granted leave to apply for an Order of Certiorari to remove to this Court and to quash the entire decision and action of the 1st Respondent* ***Kenya Plant Health Inspectorate Service (KEPHIS)*** *dated* ***20/03/2018,*** *of seizure of the 1st Applicant* ***Freshco International Limited's*** *factory/warehouse premises and the seeds contained therein, at the National Cereals & Produce Board Go-down No.016 in Industrial Area, Nakuru town.*
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> ***6)*** *THAT the Applicants be and are hereby granted leave to apply for an Order of Prohibition to prohibit the 1st Respondent* ***Kenya Plant Health Inspectorate Service (KEPHIS)*** *from hampering or interfering with the 1st Applicant* ***Freshco International Limited's*** *access and quiet occupation of, and the carrying on of its business at, the said Company's Factory/warehouse premises at the National Cereals & Produce Board Go-down No.016 in Industrial Area, Nakuru town.*
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> ***7)*** *THAT the grant of leave above do operate as a stay of the entire decision and action of the 1st Respondent* ***Kenya Plant Health Inspectorate Service (KEPHIS)*** *dated* ***03/04/2018*** *of Revocation of the 1st Applicant* ***Freshco International Limited's*** *Seed Merchant Licence, and also as a stay of the entire decision and action of the 1st Respondent* ***Kenya Plant Health Inspectorate Service (KEPHIS)*** *dated 20/03/2018, of Seizure of the 1st Applicant* ***Freshco International Limited's*** *factory/warehouse premises*

and the seeds contained therein.

8) *Costs of this suit.*

2. On the same day, Odero J. sitting in chambers certified the matter urgent and gave directions allowing prayers 1, 2 and 3.

3. The Applicants were concerned that some of the prayers they sought had not been granted. So, the following day, their Counsel filed a Certificate of Urgency which was placed before the Honourable Judge for further orders. The Learned Judge granted further leave to the Applicants to apply for orders of certiorari and prohibition in terms of prayers (4); (5) and (6). Regarding the prayer that leave so granted act as stay in terms of prayer (7) in the Chamber Summons, the Learned Judge asked the Applicants to serve the Respondents and return for *inter partes* arguments.

4. Pursuant to these orders, the Applicants served the Respondents and returned in Court, as directed, on 10/05/2018. Odero J. went on his long-scheduled transfer out of the station and, as her replacement in the station, the case file fell on my lap for hearing and disposition.

5. On the appointed 10/05/2018, a State Counsel was in Court to represent the 1st and 3rd Respondents – but had not formally filed an appearance. He indicated that they had just been served and had been unable to file anything by that morning. Noting the urgency of the issue, I directed the counsel to enter an appearance and come back on 14/05/2017. Given the impending weekend, Counsel informed Court that on that day Respondents would only be able to argue against the application for stay on law as he would not have been able to put in an affidavit by then.

6. So it was that Ms. Magana for the Applicants and Mr. Ogoso for the 1st and 3rd Respondents appeared before me on 14/05/2018 for an *inter partes* hearing on whether the leave granted by the Court to the Applicants to bring Judicial Review proceedings against the Respondents should operate as a stay against the

7. Both Counsels orally argued before me.

8. Ms. Magana argued that the 1st Applicant will suffer great injury if leave is not granted. She argued that the letter revoking the 1st Applicant's licence was issued maliciously and if not stayed it would be too late to address the constitutional violation the Applicants would have suffered owing to the letter. Ms. Magana further argued that the decision to stop all operations of the 1st Applicant underlines the malicious nature of the actions by the 1st Respondent. She told the Court that the 1st Applicant's business goes beyond the seeds business as it engages in other agri-businesses including the sale of fertilizers. The order to close its plant and warehouses, therefore, is an order deliberately paralyzing all its businesses – including those which have nothing to do with seeds. As such, the action by the 1st Respondent to this extent is without legal authority.

9. Ms. Magana further argued that the action by the 1st Respondent closing down its business is not warranted since a stop-sale order under section xx of the Seeds and Plants Varieties Act would be sufficient to deal with any perceived danger to the public posed by the impugned seeds.

10. Finally, Ms. Magana pointed out that the Affidavit by the 2nd Respondent had deponed at length the extreme financial injury which would be suffered not only by the Applicants but also by their suppliers; employees, and trading partners. She argued that it is not possible to estimate the real costs of continued closure of the business. Ms. Magana, therefore, insisted that there is, on balance, far less harm that could be suffered by issuing stay than permitting the actions by the 1st Respondent to stand pending the hearing and determination of the substantive suit.

11. Mr. Ogoso, for the 1st and 3rd Respondents vehemently opposed the Application that leave operates as stay. His opposition was based on two arguments. First, he argued that public safety and security militates against the granting of stay orders. This was, Mr. Ogoso argued, the decision to revoke the 1st Applicant's licence was based on the fact that it was selling un-certified seeds or food grains packaged as seeds leading to grave danger that the buying public would plant such seeds with the possibility of affecting food security; causing huge losses to farmers; and also spread major plant diseases. These risks, argued Mr. Ogoso, should militate against the grant of stay orders.

12. Second, Mr. Ogoso argued that the suggested Stop Sale Order would not work here because the 1st Applicant has been acting in contravention of the law since 2011 and that the 1st Respondent has issued past Stop-Sale Orders which the 1st Applicant has ignored at will.

13. Mr. Ogoso conceded that the 1st Respondent's mandate only extends to the business of the 1st Applicant dealing with seeds and plant varieties. As such, the 1st Applicant can only close down the 1st Applicant's business that is related to seeds and plant varieties. Mr. Ogoso argued, however, that the closed warehouses were used for the illegal practices which led to the revocation of the licence of the 1st Applicant and criminal charges against the 2nd Applicant and should, therefore, remain closed.

14. This being, in essence, an interlocutory application for interim relief, I am must be careful not to prematurely pre-judge any contested facts in fashioning appropriate relief. As I understand it, though not expressly called so, what the Applicants seek are, in essence, conservatory orders: they are meant to maintain the *status quo* in terms of the enjoyment of particular rights which the Applicants say are violated pending the hearing and determination of the main suit on account of the argument that if such *status quo ante* is not maintained, the fundamental rights of the Applicants will be irredeemably or at least seriously imperiled.

15. To this extent, the judicial posture of the Court at this stage is the one suggested by Musinga J. (as he then was) in Petition No. 16 of 2011, Nairobi – ***Centre For Rights Education and Awareness (CREAW) & 7 Others*** stated that:

...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

16. As I understand our applicable case law, for the Applicants to succeed in persuading the Court to grant the order that the leave to bring Judicial Review Application should serve as stay of the decisions and actions of the 1st Respondent, they need to demonstrate at least three things:

a. That the intended Judicial Review Application is arguable or that it raises a *prima facie* case;

b. There is a real risk that the Applicants will suffer irredeemable or serious prejudice as a result of the alleged illegal or unlawful action by the Respondents. See ***Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General***, Nairobi HC Pet. No 16/2011, ***Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission***, Mombasa HC Pet. No. 7 of 2011 and ***V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR***. **The prejudice to be suffered must be one which is preventable and one which, but for the action sought by the Court, would "render the Applicant helpless or hapless in the eyes of the wrong to be visited upon him." See *The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012.***

c. **Pubic interest concerns accord with the grant of the orders sought. See *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014***.

17. Regarding the last element, my brother Odunga J., after a summary of our case law, in ***Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR***, put it felicitously thus:

It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination, especially where the Court is being called upon to exercise judicial discretion.

18. In the present case, it is eminently clear that the impleaded case is not frivolous, or, by any stretch of imagination, inarguable. My sister Odero J., has already found that it raises *prima facie* case warranting it to move forward to the substantive stage. That is all that is required to meet the first prong of the tripartite test for issuance of temporary relief.

19. What about the risk that the Applicants would suffer non-trivia prejudice if interim relief is not granted? There is no doubt that the risks and the prejudice the Applicants would suffer is well documented. Indeed, the Supporting Affidavit by the 2nd Applicant catalogues the not-so-fanciful economic and reputational damages that the Applicants will suffer if the decisions and actions of the 1st Respondent are not stayed as the anticipated main suit is under consideration. The bottom line is that the impugned decisions and actions of the 1st Respondent has not only meant revocation of the 1st Applicant's licence to deal with seeds and plant varieties but it has also closed down the premises where the 1st Applicant operates from – which provides the sole source of livelihood for the 2nd Applicant. There can hardly be any more concrete loss or prejudice.

20. That takes us to the third material consideration: is it in the public interest that the order for stay should be granted? Not surprisingly, the parties have two diametrically opposed positions on any this. The Applicants insist that apprehended violation of public interest can be addressed by far less drastic measures like issuing Stop-Sale Orders. The 1st Respondent insisted that the decisions and actions taken are necessary for the protection of the public and any stay would be tantamount to prematurely unmasking the statutory mandate of the 1st Respondent.

21. I have anxiously considered arguments from both parties. I note the following:

a. If the allegations by the 1st Respondent are correct, and there is contention whether they are, then there would be need to protect the buying public from the actions and inactions by the 1st Applicants. To the extent that the suspected actions involve allegedly knowingly packaging and selling sub-standard or uncertified seeds, then there is an imperative to protect the public. As long as the allegations are not patently and demonstrably false, a precautionary approach suggests that the Court seriously considers the possibility of public safety being seriously undermined.

b. The 1st Respondent claims – and this is to be established during the hearing of the substantive suit – that Stop Sale Orders issued before have not worked to address the alleged breaches of the law by the Applicants. It, therefore, does not think that any Stop Sale Order would work now.

c. The 1st Respondent's mandate does not extend beyond regulating seeds and plant varieties. It cannot regulate any other businesses carried out by the 1st Applicant.

d. To the extent that the Applicants are carrying out any other business on the premises which have been closed down, preventing

them from carrying out those other business seems like an over-reach.

22. Consequently, considering the context and circumstances of the parties, it appears necessary to fashion orders for interim relief in a way that balances the immense private (financial) interests of the Applicants with the equally significant public interests which include safety concerns; consumer protection, and the need to permit the 1st Respondent to carry out its due statutory functions without unnecessarily impediment. The following orders will serve that purpose:

a. The decision and action of the 1st Respondent *Kenya Plant Health Inspectorate Service (KEPHIS)* dated 20/03/2018 of Seizure of the 1st Applicant *Freshco International Limited's* factory/warehouse premises is varied pending the hearing and determination of this suit to the extent that the Applicants herein will be permitted to continue operating any other businesses in the premises unrelated to the 1st Applicant *Freshco International Limited's* Seed Merchant business. For avoidance of doubt, the Applicants can carry out any other business on the premises that does not require the authorization and licencing by the 1st Respondent.

b. The direction in (a) does not permit the Applicants to, in any way, remove, trade, deal with, or any other way interfere with the stock or seeds which have been identified as non-conforming by the 1st Respondent.

c. For purposes of ensuring orderly compliance with orders (a) and (b) above, representatives of the 1st Respondent and the 1st Applicant will work together to identify, mark and sequester the seized goods.

d. In view of the potential economic effects of the revocation of the 1st Applicant's licence and the potential for such effects to be irredeemable in the long term, the hearing of the Judicial Review Application shall be expedited.

e. In view of (d) above the suit shall be conducted along the following timelines:

i. The Applicants to file and serve the Notice of Motion within seven days of today.

ii. The Respondents to file and serve their Responses within 14 days of being served.

iii. Applicants will have leave to file any further affidavit within 7 days of being served with the Respondent's suit papers.

iv. The Applicants to file and serve their written submissions within 7 days of being served with the Respondent's suit papers.

v. The Respondents to file and serve their written submissions within 7 days of being served with the Applicants' written submissions.

vi. There will be oral highlighting shortly thereafter on a date to be agreed after this ruling is read out.

f. Orders accordingly.

Dated and delivered at Nakuru this 16th day of May, 2018.

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JOEL NGUGI

JUDGE