REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISCELLANEOUS CIVIL APPLICATION NO. 45 OF 2018

REPUBLIC…….....APPLICANT

VERSUS

1. MINISTRY OF AGRICULTURE & RURAL DEVELOPMENT

2. KENYA PLANT HEALTH

INSPECTORATE SERVICE.....RESPONDENTS

3. DIRECTOR OF AGRICULTURE,

BUSIA COUNTY

AND

1. THE CHAIRMAN:-

BUSIA BORDERLINE TRADERS SACCO..... EX-PARTE

2. THE SCRETARY:.....APPLICANTS

BUSIA BORDERLINE TRADERS SACCO

3. ATTORNEY GENERAL

RULING

1. This application was brought their by way of ex-parte chamber summons dated 15th May 2018 under Order 53 Rules 1(1), 2 of the Civil Procedure Rules and any other enabling provisions of the law. The applicants are seeking for orders in the following terms:

a) That the application be heard ex-parte at the first instance. (Spent).

b) That the ex-parte applicants be granted leave to apply for an order of certiorari calling into this honourable court the unilateral and indefinite decision of the 1st respondent vide gazette Notice No. 48 of 2009 and quash the same.

c) That this honourable court grant leave to the ex-parte applicants and an order of mandamus directing the respondents to rescind their decision to increase inspection levy by 4500%.

d) That the leave if granted, to operate as a stay of implementation of section 12(c) and (d) and part B of gazette Notice No. 48 of 2009.

2. The application was premised on grounds that:

a) That the respondents acted *ultra vires* in making a blanket and indefinite decision to increase the inspection levy without consulting the ex-parte applicants and members.

b) That the gazette Notice No. 48 of 2009 was misinterpreted by the 2nd and 3rd respondents.

c) That the decision was unfair, oppressive and unconstitutional.

3. The application was opposed on the following grounds:

a) That the application was wrongly couched as if it was the state making the same.

b) That it offends the provisions of order 53 of the Civil Procedure Rules.

c) That the application does not meet the legal threshold.

4. I do not comprehend the rationale for drafting the application in the manner it was done. Certainly the state was not the applicant. The state cannot be made the applicant by the ex-parte applicants against its own agencies. To that extent the application is both mischievous and wanting in form.

5. The ex-parte applicants have contended that they were not invited before the implementation was effected. They however did not demonstrate which legal provision they were relying on. For the court to interrogate whether or not they were invited for consultations, they must ground their argument on a legal provision.

6. It was contended that the respondents acted *ultra vires*. Again this need to be demonstrated. Mere averment will not suffice. The same will apply in respect of the contention that gazette Notice No. 48 of 2009 was misinterpreted. There must be a basis for the orders sought.

7. The ex-parte applicants have made unsubstantiated claims. One such a claim is that the order by the respondents is discriminatory for it targets Busia Border alone. Upon perusal of the gazette Notice No. 48 of 2009 I did not find any clause that singled out Busia Border nor was I provided with any evidence to support the claim. The other unsubstantiated claim is that the decision by the respondents was unconstitutional. It was incumbent upon the ex-parte applicants to demonstrate the unconstitutionality of the decision.

8. Order 53 Rule 1 (2) provides as follows:

> ***An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.*** *[Emphasis added]*

The grounds relied upon by the ex-parte applicants are so bare and no reasonable tribunal can base a decision to grant the orders sought on them.

9. The contentious gazette Notice No. 48 of 2009 is dated 2nd March 2009. This is over 9 years ago. Though they are complaining about its implementation, it is abundantly clear that their quarrel is with the legal provisions on which the action complained of is based. Order 53 Rule 2 provides for time for applying for certiorari in the following terms:

> ***Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*** *[Emphasis added]*

In **REPUBLIC vs. MWANGI NGUYAI & 3 OTHERS EX-PARTE HARU NGUYAI (2013) eKLR** *Odunga J stated:*

> ***Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents** *[sic]* ***who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.***

The ex-parte applicants went to sleep and cannot be heard to challenge the implementation of a legal provision that is over nine years old on the basis of their present arguments.

10. From the foregoing, I find that the application by the ex-parte applicants has not met the legal threshold. The same is dismissed with costs.

DELIVERED and **SIGNED** at **BUSIA this 17th day** of **July, 2018**

KIARIE WAWERU KIARIE

JUDGE.