



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW CASE NO. 3 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS FOR
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE DECISION OF THE RESPONDENT CONTAINED IN THE LETTER
AND/OR CIRCULAR DATED 15TH AUGUST, 2012**

BETWEEN

WEST KENYA SUGAR CO. LTD.APPLICANT

VERSUS

KENYA SUGAR BOARD RESPONDENT

RULING

Messrs West Kenya Sugar Company filed a chamber Summons on 14th February, 2013 under Order 53 rule 1 (2) of the Civil Procedure Rules seeking the following orders -

“That the Honourable court be pleased to grant the applicant leave to apply for -

- a. **An order of Certiorari to bring to this court and quash the decision of the respondent contained in the letter and/or circular dated 15th August 2012 purporting to assert existence of sugarcane command areas and requiring the applicant to adhere to purported industry cane harvesting framework at the risk of withdrawal of the applicant's operating licence.**
 - b. **An order of prohibition be issued to prohibit the respondent from enforcing the purported sugar command zones and industry harvesting framework pursuant to the respondent's decision contained in the letter dated 15th August, 2012.**
- **That the grant of leave do operate as a stay to bar the respondent from enforcing and/or implementing their decision contained in the letter and/or circular dated 15th August, 2012 purporting to assert existence of sugarcane command areas and the alleged agreed sugar industry cane harvesting framework and any subsequent report or action arising there from including the implementation of the threats to withdraw the applicant's operating licence, for purposes of maintaining status quo while pending the outcome of these proceedings.**
 - **That the respondent be condemned to bear the costs of these proceedings.“**

The Chamber Summons was filed with a statutory statement and an affidavit verifying the facts as required by the law.

The matter was filed under Certificate of urgency. When the application was placed before me ex-parte, I ordered that it be served for inter-partes hearing. Consequent upon the court's orders, the application was served and the respondent filed a Notice of Preliminary Objection. I decided to deal with the objection first as a preliminary legal issue. I later gave a ruling dismissing the objections of the respondent.

Together with the preliminary Objection, the respondent filed a replying affidavit opposing the application for leave to file Judicial Review proceedings. After dismissing the preliminary objections, the respondent filed an appeal in the Court of Appeal at Kisumu. They also filed a Notice of Motion dated 13th June, 2012 seeking the following orders

- **That this Honourable court be pleased to issue a stay of further proceedings in this matter pending the hearing and determination of an appeal against the decision of Honourable Justice Mr. George Dulu, issued on 23rd May, 2013.**
- **That the costs of this application be provided for.**

The court on concurrence of counsel for both sides, directed that the two applications be canvassed and determined together through written submissions. Submissions to both applications were filed by the applicant and respondent. The applicant filed further submissions on 6th November 2013.

The counsel who appeared for the parties at the hearing highlighted the written submissions filed.

The application dated 14th February 2013 and filed on the same date is an application for leave to file judicial review proceedings. Such application is ordinarily an ex-parte application heard and determined by the judge on hearing only the applicant. In this particular case, the court decided that the respondent be served for inter-partes hearing of the application. This was because the court noted that there were pending various cases that is Kakamega HCCC. No. 233/12, Kisumu HCCC No. 175/12 and Bungoma CMCC No. 476/12 relating to similar complaints between the applicant and other parties in the sugarcane industry.

The respondent herein is the regulator of the sugar industry in Kenya. They have objected to the grant of leave herein on the ground that there exist alternative remedies which have not been exhausted by the applicant.

I agree with the decision in **Nasieku Tarayia -vs- Board of Directors, Agricultural Finance Corporation & Ano. [2012] eKLR** - that Judicial Review is an alternative remedy of last resort and where alternative remedies exist, the court has to be satisfied that judicial review is the more convenient, beneficial efficacious alternative remedy available, for the court to grant leave.

In the present case, it is not clear to me that there is indeed an alternative and satisfactory remedy to the complaints of the applicant. A mere allegation from an opposing party that there is a more convenient remedy is not adequate to persuade the court not to grant leave.

Another complaint of the respondent is that the application was made more than six months after the decision sought to be challenged was made. The applicant has only cited a letter which was written by the Chief Executive Officer of the respondent dated 15th August, 2012. The application having been filed in February 2013 was within the six months period allowed by law. That letter under reference is quite vague on exactly what was being implemented. This court cannot say for certain for example, when principles were adopted by the joint stake holders on cane harvesting. The letter also refers to meetings whose dates are not indicated. It also refers to harvesting contracts by many millers and independent growers. In my view, one cannot say that the applicant filed this application outside the six months period since, he is challenging the implementation of the communication dated 15th August 2012. Other substantive facts will be argued by the parties after leave is granted.

In determining whether to grant leave to file judicial review proceedings, the court is required to consider whether the applicant has a prima facie case. The respondent is a statutory organization whose decisions could affect the applicants. This is because the applicants are operators in the sugar industry and the respondent is the regulator. The letter in contest herein was written by the Chief Executive Officer of the respondent. It cannot be said therefore that it has no effect on the applicant. A prima facie case is one which may or may not succeed. It is not a case that must succeed. With the facts placed before me at this preliminary stage, I am of the view that the applicant has a prima facie case entitling them to the grant of leave to file judicial review proceedings. The issue of whether certiorari or prohibition can be issued by the court is a substantive issue to be determined after the main motion is heard between the parties.

The applicant has asked for a stay of implementation of the Circular letter in question. This request has been strongly opposed by the respondent on the ground that it will cripple the operations of the sugar industry. I do not agree with the arguments of the respondent. They refer to agreements or understandings reached in the year 2010 which is more than two (2) years before the issuance of the circular now in contest. If there was to be a disarray in the sugar industry, it should have been known within those two years. It would have been an evident fact by now that they should have demonstrated to the court. They did not do so.

In the circumstances of this case however, I will not grant stay. This is because there are several other cases pending that are related to the same operations of millers in the sugar industry. Those cases were filed before these current proceedings. If stay orders were necessary, they should or could have been obtained in those proceedings. On that ground, I decline to grant the stay orders sought.

I now turn to the application by way of Notice of Motion filed by the respondents and dated 13th June, 2013. It is an application for stay of further proceedings herein pending determination of an appeal filed in the Court of Appeal. In my view, that application is not merited. Judicial review proceedings are by nature meant to be urgent or to be determined expeditiously. Staying these proceedings will mean going against that principle. More importantly however, this court is not in control of the diary and programme of the Court of Appeal. Therefore, these proceedings cannot be stayed by this court in speculation of the time when the Court of Appeal will determine the appeal. Additionally, if indeed the Court of Appeal wishes to stay further progress in these proceedings, in my view, an appropriate application can and should be filed and canvassed in the Court of Appeal. In the result, I find no merits in the Notice of Motion and I will dismiss the same.

Consequently, these are the orders of the court -

1. Leave is granted to the applicant West Kenya Sugar Company Limited to file Judicial Review proceedings for certiorari and prohibition as requested in the application dated 14th February, 2013. The request in that application for stay is dismissed.
2. The Notice of Motion dated 13th June 2013 filed by the respondent Kenya Sugar Board is hereby dismissed.
3. Costs are in the cause.

Dated and delivered at Kakamega this 13th day of February, 2014

George Dulu

J U D G E