



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

J R MISC CIVIL APPLICATION NO. 368 OF 2010

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION
AND MANDAMUS**

AND

IN THE MATTER OF SECTION 191 OF THE AGRICULTURE ACT, CAP 318

AND

**IN THE MATTER OF THE HORTICULTURAL CROPS DEVELOPMENT AUTHORITY
ORDER, 1995,**

AND

**IN THE MATTER OF THE AGRICULTURAL PRODUCE (EXPORT) ACT, CHAPTER 319,
LAWS OF KENYA**

AND

**IN THE MATTER OF THE HORTICULTURAL CROPS DEVELOPMENT AUTHORITY
(IMPOSITION OF LEVY) ORDER, 1995**

AND

**IN THE MATTER OF THE CUSTOMS AND EXCISE ACT, CHAPTER 472, AND ALL ITS
BOOKLETS AND SCHEDULES AND OTHER RELATED LEGISLATION THERETO**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HONOURABLE

MINISTER OF AGRICULTURE.....1ST RESPONDENT

COMMISSIONER OF CUSTOMS & EXCISE.....2ND RESPONDENT

EX PARTE APPLICANTS

1. EQUITORIAL NUTS PROCESSORS LIMITED
2. SAWA AFRICA EPZ LIMITED
3. KENYA NUT COMPANY LIMITED
4. WONDER NUTS (KENYA) LIMITED

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 22nd December 2010, the *ex parte* applicants herein, **Equitorial Nuts Processors Limited, Sawa Africa Epz Limited, Kenya Nut Company Limited And Wonder Nuts (Kenya) Limited**, seek the following orders:
 1. That this Honourable Court be pleased to issue an order of Certiorari to remove and bring to court and quash the proceedings, record and decision(s) of the 1st respondent made on 15th December 2010, or thereabout that lifts the ban on the export of raw nuts (nuts in shell) and described as of the following varieties: macadamia nut (macadamia SPB) cashew nut (Anarcadium Occidentale) Pistachio nut (Pistachio vera) and Oyester nut (Tarfaira Pedata) and the said to start on 15th December, 2010 to 30th June 2011. And/or any such decision, order proceedings and/or Gazette Notice of the said effect, intended to be published and/or now being published with these proceedings.
 2. That this Honourable Court be pleased to issue an order of Prohibition to prohibit and direct the 1st Respondent from lifting the ban aforementioned hereinabove and the 2nd Respondent from allowing and shipping the said raw nuts (nuts in shell) from Kenya by persons/firms when the same are raw nuts of the varieties of macadamia and cashew nuts described in paragraph 3 hereinabove.
 3. THAT this Honourable Court be pleased to issue an order of Mandamus directing the Respondents to take all steps necessary to enforce the ban/prohibition of the marketing and/or export of raw nuts (nuts in shell) from Kenya.
 4. That costs of this application be provided for.

EX PARTE APPLICANT'S CASE

2. In support of the application the applicants filed a verifying affidavit sworn by **Johnson Muruiki Muhara**, the Managing Director of Equitorial Nuts Ltd, one of the applicants herein.
3. According to the deponent, the applicants are in the business of planting, harvesting and contracting farmers and have invested in the processing and export of nuts in Kenya that include macadamia and cashew nuts. According to him the aforesaid companies have been in the said industry for now periods ranging over 10 to 36 years and have invested very heavily in terms of land, machinery and equipment and training of farmers and other services like marketing and exporting of the processed nuts. In the year 2009, following complaints from the stakeholders who included the applicants and other processors and exporters the 1st respondent's predecessor Honourable **William Ruto** made a decision and Gazetted it prohibiting the exportation of raw nuts (Nuts in shell) by Legal Notice No. 109 of 16/6/2009. But due to laxity in enforcing the prohibition and as a result of complaints by players in the industry, the 1st respondent held a series of consultative meetings and exchanged correspondences with stakeholders including the applicants with one of the issues being discussed being the recommendations of a task force appointed by the 1st respondent to study and take views and make recommendations towards the improvement of the industry. According to the deponent, the said task force made recommendations inter alia the maintaining of the ban of the said export of raw nuts. On 8th December 2010, the 1st respondent again invited the stakeholders including the applicants to a meeting that specifically discussed the problems affecting the cashew nuts sector of the nuts industry in Kenya and further recommendations included encouraging the processors to invest more by way of facilitation of seedlings to the farmers so as to expand the acreage, and increased production.

4. It is deposed that given the aforesaid circumstances, the applicants were made to believe to date that the Respondents were therefore obligated to protect the local nuts industry by the continuation of the ban, and that any further control and regulation that can introduce adverse effects on them and their businesses, and the domestic beneficiaries thereof, was not to be done without sufficient consultations, and that the said reversal of policy would not be undertaken without first affording them a hearing and that to discreetly make a decision and Gazette it is oppressive, an abuse of power and done for ulterior motives. According to the deponent the excuse advanced in the said notice being to mop up excess crop is not true as there is no excess crop as the cashew nut season has just begun and macadamia season does not start until March/April 2011.
5. It is deposed that the applicant have learned of an intended notice made by the 1st respondent on 15th December 2010 whose intention is to lift the ban of the export of the raw nuts for a period of six months from 15th December 2010 which according to the deponent is for an entire season. To the deponent, the applicants have sufficient capacity to buy, harvest, process and export all the raw nuts now and being produced in Kenya and there is no excess supply or availability of raw nuts with the farmers as alleged by the 1st respondent.
6. It is the applicant's position that the 2nd respondent is obligated to act in line with the decision of the 1st respondent.

1ST RESPONDENT'S CASE

7. In opposition to the application, the 1st respondent filed a replying affidavit sworn by **Romano M. Kiome**, the Permanent Secretary, in the Ministry of Agriculture on 4th February 2011.
8. According to him, in the year 2009 the then Minister of Agriculture by legal notice no 109 of 16th June 2009 imposed a ban on exportation of raw nuts which ban was aimed at helping the processing industry to get adequate raw materials, create employment, promote rural industrialization and enhance export earnings. The ban was also intended to attract investors to put up processing units in the country. However following the ban on the export of raw nuts in 2009 the local processors were able to gather raw nuts from the farmers consequently leaving the farmers with excess nuts whose availability led to lack of market forcing farmers to dispose of their nuts at low prices. It is deposed that this lack of readily available market was caused by the fact that exporters moved to other countries due the said ban and that it was the abovementioned reasons which forced the Minister to lift the ban on export of raw nut pursuant and in exercise of powers vested upon her by the provisions of Section 192 of the **Agriculture Act** cap 318 of the laws of Kenya. Accordingly, the Minister of Agriculture (the 1st Respondent herein) lifted the ban on export of raw nuts on the 15th December 2010 for a period of six months vide gazette notice 166229
9. To the deponent, the **Agriculture Act** Cap 318 gives the Minister of Agriculture powers as the ministry concerned to regulate and control the market in respect to raw nuts and also provide an environment where farmers can complete in a fair and free market and that the Minister lifted the ban for a limited period of six months to allow exporters to access the market so as to purchase the excess raw nuts to avert waste to the detriment of the farmers. It is therefore the deponent's view that the decision to lift the ban on the raw nuts will not only be beneficial to the farmers who will obtain competitive prices from the produce but also the Kenyan economy. According to legal advice, he believes that the orders being sought by the applicants are untenable as the correct procedure was followed lifting the ban hence orders sought cannot be granted and that the application and the evidence presented in support of it do not meet the threshold required for grant of the orders sought and further that the application offends mandatory provisions of Section 16 of the **Government Proceedings Act** Cap 40 Laws of Kenya as the 1st Respondent cannot be restrained from performing his statutory duties and obligations.

2ND RESPONDENT'S CASE

10. The 2nd Respondent, on the other hand opposed the application through an affidavit sworn by **Seraphine Anamanjia**, its Revenue Officer on 24th February, 2011.

11. According to her, the 2nd Respondent is appointed under Section 13 of the **Kenya Revenue Authority Act** (“KRA Act”), Cap 469 Laws of Kenya and that under Section 5(1), the Kenya Revenue Authority is an agency of the government for the collections and receipt of all revenue. Further, under Section 5(2) with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the First Schedule for the purposes of assessing, collecting and accounting of all revenues in accordance with those laws while under the first schedule of the KRA Act the 2nd respondent administers the **East Africa Community Customs management Act** and **The Customs and Excise Act** (“The Acts”) and her role is to regulate the importation and exportation of goods and services under the Acts. In carrying out her statutory mandate under the Acts, it is deposed the 2nd Respondent enforces all laws, including Legal Notices gazetted by the respective ministers which regulate the importation and exportation of goods and services in the country.
12. According to the deponent, the 1st respondent lifted the ban on the export of raw nuts through a Gazette notice No. 16229 dated 15th December, 2010 and the said lifting was to start on 15th December, 2010 to 30th June, 2011. By an order made on 17th day of December 2010, the Ex-parte applicants were granted leave to apply for Judicial Orders of Certiorari, prohibition and mandamus, which leave was directed to operate as a stay of the aforesaid decision by the 1st Respondent and further, the 2nd Respondent was stopped from allowing any export of raw nuts until the hearing of the main motion or until further orders of the Court. The said Order and the Penal Notice was served on the 2nd Respondent on 21st December, 2010. According to legal advice received the 2nd Respondent is only a nominal party in these proceedings as its role would be to enforce the Gazette notice referred in paragraph 7 above but due to the stay orders made by the honourable Court, the 2nd Respondent has stopped the exportation of the raw nuts in compliance with the Court Order and therefore the 2nd Respondent will abide by the Courts ruling in the said two Applications. However, it is deponent’s view that if the said two applications are heard and determined, the Court ought to make a specific order on the role of the 2nd Respondent as the current stay order generally stops the exportation raw nuts. To her there are no allegations specifically made against the 2nd Respondent to warrant her being joined in these proceedings as a Respondent or at all and in view of the foregoing, no order of costs should be made against the 2nd Respondent in these proceedings.

1ST INTERESTED PARTY’S CASE

13. On behalf of the 1st interested party, a replying affidavit was sworn by **Zhang Pei**, its director on 25th February 2011.
14. According to him, the 1st interested party is a limited liability company incorporated under the **Companies Act** Cap 486 of the laws of Kenya, whose objectives include *inter alia* the exportation of raw macadamia nuts to China, where there is a large market for the same. According to him, following the ban on the export of raw nuts in May 2010 imposed by the 1st Respondent, the local processors, including the ex parte Applicants were able to gather raw nuts from the farmers consequently leaving the farmers with excess nuts. To him, the rationale behind the imposition of the aforesaid ban on the exportation of raw nuts in May 2010 was so as to attract investors to put up processing units in the country, but regrettably the said ban resulted in decline in the production and returns to farmers, consequently a factory could not be established leaving the farmers with tonnes of raw nuts. He deposed that once again, on the 15th day of December, 2010, the 1st Respondent lifted the ban on export of raw nuts so as to facilitate the mop up of the excess raw nuts with farmers and that as a matter of fact, the 3rd Applicant's officer, one **Mr. James Ndegwa** confirmed in no uncertain terms that as at on or about 18th day of May 2010, the 3rd Applicant had collected approximately 7,000 tonnes of nuts compared to 3,000 tonnes the previous season and accordingly its warehouse was full. To him, ex parte Applicants have premised their Application on the recommendations proposed by the task forces appointed by the 1st Respondent, which recommendations he is advised by the 1st interested party's advocates are in any event are not

binding upon the 1st Respondent and it is clear beyond a shadow of doubt that indeed the ex parte applicants were afforded opportunity to make representations on *inter alia* the consequences of lifting the ban on export of raw nuts. It is his belief that the decision by the 1st Respondent made on the 15th day of December, 2010 to lift ban the export on the raw nuts was informed by the fact that there was a necessity to allow the exporters to access the market so as to purchase the excess raw nuts to obviate waste to the detriment of the farmers and that in arriving at the decision to lift the ban imposed on the exportation of raw nuts, the 1st Respondent acted within the powers vested upon her by Section 192 of the **Agriculture Act** which empowers her to regulate and control the marketing of crops by growers and others including requiring of growers and others to sell crops to particular persons only.

15. It is therefore the deponent's view that the Applicants have not established that 1st Respondent has acted in excess of the powers vested upon her under the Act and that the lifting of the ban has the direct effect of creating competition that will enable the farmers to obtain better prices for the raw nuts to their advantage in view of the increased consumption of the nuts in the importing countries including China and that in any event, the exportation of raw nuts to China and other countries is without a doubt a major foreign exchange earner for the Kenyan Government which has the effect of narrowing the trade deficit between Kenya and China. Consequently, he believes that should the orders sought be granted, the Kenyan Government will lose close to Kshs.750 Million in foreign exchange yet the decision to lift the ban on the export of raw nuts will not only be beneficial to the farmers who will obtain competitive prices for the produce but also for the Kenyan economy since the trade imbalance between Kenya and China will be narrowed tremendously, a fact that acknowledged by the People's Republic of China.
16. To the deponent, notice of motion Application dated 22nd day of December, 2010 in the premises is incompetent and ought to be dismissed with costs as no, any or any sufficient material has been placed before the court as a basis for grant of the orders sought and that the Application constitutes a gross abuse of the court process.

3RD INTERESTED PARTY'S CASE

17. In opposition to the application the third interested party, **Horticultural Development Authority**, filed a replying affidavit sworn by **Alfred K. Serem**, its Managing Director on 4th March 2011.
18. According to him, the authority is a body Corporate established by Order in legal notice No. 23 of 1985 under section 191 (1) of the laws of Kenya (hereinafter referred to as "the order") and its mandate is stipulated under clause 10 of the order by which clause the authority is clearly a interested party herein as the banning of the export of nuts, the orders issued by this court on 17th December, 2010 and the prayers contained in the notice of motion dated 22nd December, 2010 directly affect the it. According to the deponent, the ban on export of specified (sic) in gazette notice number 109 of 2009 did adversely affect the very persons the order was made to protect and regulate. By virtue of paragraph 1(g) of the order all persons or institutions mentioned there under are supposed to be treated equally. It was realized that by continued ban on the export, exporters who are supposed to be represented in the authority were being discriminated against and that the ban also continued to affect farmers who were producing surplus yet the ex-parte applicants were not able to consolidate demand enough to satisfy supply of the nuts the farmers were harvesting. According to him, there is no legal basis, justification or provision which binds the 1st respondent or the authority to go by recommendations proposals or agreements reached in any seminars, workshops or task force. To him, the orders granted herein and what the ex-parte applicants are praying for is reducing this court to a market regulator or player and in the said circumstances this court has no jurisdiction to grant orders sought.
19. It is further deposed that in gazette legal notice number 109 of 2009 the 1st respondent did not make any promise or undertaking to the ex-parte applicants or any one else that the ban shall be perpetual and there are no legal duties or obligations placed upon the 1st respondent or the authority to keep the ban aforesaid. To him, if the ex-parte applicants are serious investors as they purport, they can as well engage in export to give the industry a competitive edge to spur economic growth and that contrary to the allegation that they are adversely affected by the lifting

- of the ban they ought to be beneficiaries thereof.
20. To the deponent, the application is anticipatory and has no basis in law as the ex-parte applicants did not lift a finger when the 1st respondent lifted the ban vide legal notice number 6208 of 2010.
21. It is further contended that the notice of motion has been brought under provisions of law which have been repealed and as such cannot succeed and further the application is incompetent, bad in law and fatally defective as the applicants have not lodged a copy of the gazette notice they are complaining before the notice of motion was filed. There is nothing to be quashed.

AN AFFIDAVIT FILED BY KENYA NUTS GROWERS ASSOCIATION

22. There is on record an affidavit sworn by **John Safari Mumba**, the Chairman of the Kenya Nuts Growers Association. The said affidavit is clearly sworn in support of the ex parte applicant's motion. Order 53 rule 6 of the Civil Procedure Rules provides as follows:

On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.

23. It is clear therefore that a person who ought to be heard under rule 6 aforesaid is a person who desires to be heard in opposition to the motion unless the court orders otherwise.

DETERMINATION

24. In support of their various positions the parties herein filed submissions which I have considered. It is clear that what is sought to be quashed is the Gazette Notice No. 16229 dated 15th December 2010 and published in the Kenya Gazette of 17th December 2010 although the said Notice is not exhibited in the verifying affidavit. However as the same is exhibited in the replying affidavit, no issue turns on that point.
25. What is clear is however, that the lifespan of the said Gazette Notice was between 15th December 2010 and 30th June 2011 (now past). The said Gazette Notice has to all intents and purposes run its course and is no longer effective. Pursuant to the orders of stay granted herein it never saw the light of the day until it died a natural death. The prayer seeking the quashing of any orders which are yet to be made cannot be granted in the manner in which they are sought since the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of **Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993** where it was stated; "Certiorari deals with decisions already made Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice...". With respect to the orders of prohibition it was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** that judicial review is only concerned with the reviewing of the decision making process. Accordingly since the jurisdiction of the respondents is not challenged, the court cannot give an order in perpetuity. Similar position applies to the prayer for mandamus.
26. Accordingly, even if I were to find that the application was merited the law is that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the

prayed orders and hence the Court will refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

27. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

“It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* 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 or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances.”

ORDER

28. Accordingly I decline to grant the orders sought herein. In the result the Notice of Motion dated 22nd December 2010 fails and is disallowed but with no order as to costs

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Musyoki for the 3rd interested party, Mr Wilson for the ex parte applicant, Mr Ngechu for the 9th interested party, Mr Nyaga for the 2nd respondent and Miss Chege for Mr Kiage for the 1st respondent.