REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Civil Application 329 of 2009
IN THE MATTER OF AN APPLICATION FOR JUDICIAL AREVIEW FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND2

IN THE MATTER OF SUGAR ACT, 10 OF 2001

AND

IN THE MATTER OF KENYA SUGAR BOARD

AND

IN THE MATTER OF A DECISION BY THE KENYA SUGAR BOARD TO PRODUCE FERTILIZER AND TO SOLICIT FOR TENDERS FOR FERTILIZER

JOSHUA OMANJE AUTE
AUGUSTINUS DEYA HASSAN…….. EX PARTE APPLICANTS
WASHINGTON SILVANUS WASHIALI KHWALE ….. 1ST INTERESTED PARTY
ISAAC ASHUMA OMUSEBE…….. 2ND INTERESTED PARTY
SILAS ANYANGU CHUNGE…….. 3RD INTERESTED PARTY

RULING

The ex parte Applicants are Joshua Omanje Aute and Augustinus Deya Hassan. They describe themselves as Sugarcane Farmers in Nyanza Province. The Respondent is the Kenya Sugar Board (KSB). The Applicants seek the leave of this court to commence Judicial Review proceedings for the following orders;

a) An order of certiorari to remove into this court for purposes of being quashed the decision of the Kenya Sugar Board (Respondent) to solicit tenders for fertilizers.

b) An order of prohibition to prohibit the Respondent from soliciting tenders of fertilizers.

c) An order of mandamus compelling the Respondent to withdraw any solicitations or advertisements of tenders of fertilizer from its website or any other publications.

d) That the leave operates a stay of all processes or actions initialed by the Respondent in relation to the tendering and solicitation of tenders for supply of fertilizer.

The Applicant has raised several issues in support of the chamber summons, namely

1. Whether the Applicants have the locas standi in this matter.
2. Whether the decision of the Respondent is illegal and irrational;
3. Whether the Respondent failed to take into account irrelevant considerations;
4. Whether the decision is in Breach of the Applicants legitimate expectation.

The chamber summons is supported by the verifying affidavit of Joshua Aute dated 5/6/09, supplementary affidavit of Deya Hassan dated 5/6/09, further Affidavits of both Applicants dated 17/10/09 and a supplementary affidavit of Aute dated 30/10/09, lists of Authorities dated 14/4/09, 20/7/09 and 30/10/09 and submissions filed on 12/6/09.

I directed that the chamber summons be heard interpartes as a result of which the Respondent filed a Replying affidavit dated 15/6/09 sworn by Agneta Ouma, written submissions on 29/9/09.

The ex parte Applicants describe themselves as Sugarcane Farmers from West Sakwa Location Rongo District and they have entered into contracts with South Nyanza Sugar Company and that the said contracts impose binding

obligations on the Applicants as respects Sugar Farming. The contract was exhibited (JOAI) The Applicants are aware that the Sugar Act, 2001, was enacted for the benefit of the cane farmers and that the Sugar Board created under the Act controls the Sugar Development fund and there is a manual developed containing the policy guidelines on the operations of the Fund. The manual was also exhibited as JOA 2. Joshua learned from his fellow farmers that the Kenya Sugar Board had advertised to tender for 3,183,900 or more Kilograms of fertilizers in the local dailies which he confirmed (JOA 3). Though he tried to make further inquiries from the Board about the tender, no more information was divulged. That the procurement of the fertilizer is likely to be made out of the Sugar Development Fund as the Minister had indicated that it would be made out of Sugar levies which make the fund The Applicants believe that the procurement of fertilizers has no benefit to the Sugar Industry but that the whole process seems to be corruption as the beneficiaries are likely to be the suppliers. The president announced on Madaraka day that there was already fertilizer imported in the country and there is no guarantee that the fertilizer procured will benefit the farmer in terms of low prices. The Applicants apprehend that the Sugar Fund will be depleted and the farmers are likely to be overburdened by the levies. The Applicants contend that the Respondent has no legal authority to procure fertilizer and that its mandate is limited to the objects and function stipulated under S 4 of the Act which include regulator, developer, promoter, coordinator and facilitator but not as participant or supplier. The Applicant also challenges clause 2.3.4 of the tender document 'JOS 4' which is in conflict with S 40 (1) of the Public Procurement and Disposal Act because in the event of a dispute it puts the Applicants in conflict as regulator as the Respondent can not act as a procurer , facilitator or promoter. The Applicants also allege procedural impropriety as there was no resolution approving Central procurement. The Applicants other contention is that the Respondents have relied on the strategic plan as providing for procurement of fertilizer but that the strategic plan cannot expand their mandate. The Applicant also challenges the appointment of Rosemary Mkok as CEO of the Sugar Board for lacking the necessary qualifications and could not have undertaken any action under the Sugar Act and whatever she has done is null and void.

The chamber summons was opposed and Agneta Ouma, a Senior procurement officer with the Respondent filed an affidavit dated 15.6.09. Agneta Ouma does concede that there is indeed an International tender for procurement of fertilizer and the decision to import fertilizer was informed by inter alia, the fact of delays and inadequate supply of fertilizers so that farmers got the supply late leading to poor yields and that participation of middlemen in procuring the fertilizer ended in unreasonably high costs of fertilizers and poor yields. That the stakeholders considers the above issues and the idea was conceived during the Sugar Industry Strategic Plan Review Workshop held on 28th – 29th February 2008 and in a meeting of the 4th Procurement Advisory Committee, held on 8/1/09, they passed several resolutions including the procurement of fertilizers. Papers were prepared recommending the modalities of procuring fertilizers. Approval by the Ministry was required and the Sugar Industry Institutions needed to confirm their requirements. The Ministry's approval was received on 22/4/09. The Respondents contend that they have only stepped into the matter as a facilitator not a participant and or a beneficiary. That the Respondent will not at any time handle the fertilizer and will not be charged with transportation/delivery to the various destinations in Western and Nyanza Provinces and it is the Advisory committee that will be charged with that duty. According to the Respondent, fertilizer is an integral part of cane development and its is an investment in the development. That the Applicants will benefit from availability of fertilizer and reduced prices and hence profitably. Agneta denied that there will be shortage of funds from the SDF as loans are always available.

Mr. Ngugi counsel for the Respondent in his submissions, Respondent urged that the Applicants lack the necessary standing

to bring this claim and relied on the decision of ***O. REILLY V MACKMAN (1982) 3 ALL ER* 105** where the court said that for leave to be granted, one had to demonstrate that they had an interest in the matter so us to curb abuse of the court process and keep away busy bodies.

Mr. Ngugi also submitted that the chamber summons application is incompetent as it seems to be seeking substantive orders like in a notice of motion. He relied on ***FARMERS BUS SERVICE V THE TRANSPORT LICENSING APPEAL TRIBUNAL*** (1959) EA 779 where the court set out the format of both the chamber summons and notice of motion applications of Judicial Review and which format have to be strictly observed.

Counsel also urged that the application is a muddle and incompetent as it seeks to prohibit the decision to tender yet it has already been done and that the order of mandamus cannot also be granted because the Applicant has not disclosed that the Applicants are in breach of any statutory duty. Mr. Ngugi also alleged that the Applicants have relied on grounds that are not pleaded in the statement and that is contrary to Order 53 Rule 4 Civil Procedure Rules.

The Interested Parties supported the chamber summons, though at this stage they are not required to take part in the proceedings. They can only come in after leave is granted. At this stage, all that this court needs to establish is whether the Applicants have an arguable case. In the case of ***NJUGUNA V MINISTER FOR AGRICULTURE (2000) E.A 184,*** the Court of Appeal held that the test as to whether leave should be granted to an Applicant for Judicial Review is whether, without examining the matter in depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive motion. So without delving into the depth of the matter and pre empting the decision that may be made in the notice of motion, I will consider the pleadings and submissions made before this court based on the above.

The Respondent raised issue with the standing of the Applicants in this matter. The Applicants described themselves as farmers of cane in Nyanza province. The pay levies which make up the Sugar Development Fund. They have also signed a Growers Cane Farming and Supply Contract with the South Nyanza Co. Ltd which imposes obligations over them as regards Sugarcane farming. The contracts were exhibited (JOA). Standing in a pre condition for

the grant of leave to commence Judicial Review proceedings. Michael Fordham in his Book, Judicial Review Handbook 4th Edition says that a claimant for Judicial Review must have a sufficient interest in the subject matter. In ***R V INLAND REVENUE COMMISSIONER ex parte NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESSES LTD (1982) AC 612*** Lord Diplock had this to say of sufficient interest,

"The draftsmen avoided using the expression 'person aggrieved' although it lay ready at his hand. He chose instead ordinary English words which on the face of them leave the court an unfettered discretion to decide what in its own good judgment it considers to be sufficient interest on the part of (a claimant) in the particular circumstance of the case before it. For my part, I would not strain to give them any narrative meaning."

What I understand Lord Diplock to mean is that what interest a person will have in a subject matter varies from one case to the other and it is in the discretion of the court to determine whether a claimant has an interest or not. In the instant case, I am of the view that the Applicants have a sufficient interest in the Sugar industry given that they are cane farmers and will be affected by the decisions taken by Sugar Board. Besides S 2 of the Sugar Act defines Interested Parties to include, the Government, Millers, Growers, outgrowers institutions. The Applicants are growers of cane and therefore Interested Parties and properly before this court. The Applicant seeks to challenge the decision of the Sugar Board on account of illegality.

The Sugar Board is set up under the Sugar Act and its functions set out under S 4 of the Act. The functions are inter alia regulation, development, promotion of the Sugar Industry, Coordination of activities of individuals and organizations etc. Section 6 of the Sugar Act gives the KSB powers to manage and invest any funds under its control. These are granted under S 6 (e) (6 (1) and 22. The Act then creates the Sugar Development Fund under S 19 which is to be administered and managed by the KSB. The Fund consists of the Sugar Development Levy, funds provided by parliament for purposes of the funds provided by bi- lateral or multilateral donors. The Respondents argued that the Respondents has unqualified discretion under ***S 3 (2) (d) and (6) to perform its functions. S 3 (2) (d) reads as follows:-***

"3 (2) The board shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of

(a) .....

(b) .....

(c) .....

(d) Doing or performing all such other acts or things necessary for the proper performance of its functions under the Act as may be lawfully done or performed by a body corporate.

(3) .....

Under S 4 (2), (a) the Board has powers to "**perform such other functions as may, from time to time be assigned by the Interested Parties".** Under S 6 (e) of the Sugar Act, the KSB has promulgated policy guidelines for managing the Sugar Development Fund which are contained in the Sugar Development Fund operations manual of April 2008. Clause 1.1 thereof indicates that the fund was created as an evolving fund to finance activities of the Sugar Industry.

The question therefore is whether tendering for fertilizer, is one of the functions of the Respondent specified under the Act – S6

S 22 of the Act provides for how the Board may invest the funds of the Board. Is the financing of fertilizer part of the functions of investment ? The Respondent contends that there was a resolution of the Sugar Advisory Committee that gave the Respondent the mandate to go ahead and procure for fertilizer. The issue will be whether there exists such resolution and whether the resolution is in tandem with the functions of the Respondent under the Act.

It is also the Applicant's case that the Respondent's did not seek the Ministry's approval before the tender procurement was

That Though the Permanent Secretary in the Ministry advised that

at the procurement was not within the Board's budget and declined to seek the Ministry's approval there is no evidence of it.

The other question is whether S 20 and 21 of the Act were complied with.

Section 21 requires that the Board prepare its estimates of revenue and expenditure for each financial year. Was fertilizer budgeted for in that year? The other issue that has been raised is whether the Respondent can act both as facilitator and procuring entity because that comes into direct conflict with S 40 of the Public procurement and Disposal Act which prohibits corrupt practices in procurement by any party to the process.

As to the competence of the Application, it is true that the Header of the Application does not indicate that it is an application for leave. However the prayers are clear that it is an application for leave. It is the ex applicants who are named as such and in my view the defect in the chamber summons is not fatal to the application. In ***FARMERS BUS SERVICE V LICENSING APPEALS TRIBUNAL (1959) EEA 779*** the Court of Appeal of E. Africa said that a Notice of Motion must be brought in the name of the Crown (Republic) and has to be properly intituled. Proper Intituling is at Notice of Motion stage not leave stage. The Respondents will not suffer any prejudice due to the said defect in the Header of the chamber summons.

All in all, I do find that there are arguable issues that have been raised by the Applicants which need to be addressed at the substantive hearing of the Notice of Motion. This court has pointed to only some of the issues. In that

respect, I grant leave to the Applicants to commence Judicial Review proceedings as prayed in the chamber summons dated 5/6/09. It is not clear from the pleading before me whether the tender process is conducted.

Due to the fact that the tender involves collosal sums of monies and if stay is not granted to suspend the tendering process till this matter is heard. This court orders that the same be fast trucked and there be a stay for 60 days.

It is directed that the Notice of Motion be filed and served within 7 days. Thereafter the Respondent and Interested Parties do file and serve their replying affidavits if any, within another 7 days. Upon service of the replies, the Applicants do file and serve their submissions and lists of authorities within 7 days and the Respondents and Interested Parties likewise serve theirs within 7 days. The matter will then be mentioned on 29th March 2010 for directions on the hearing of the substantive motion.

Dated and delivered at Nairobi this 1st day of March 2010.

R.P.V. WENDOH
JUDGE
Present:
Mr. Watta for Applicant and holding brief for
Ms Esoge for the Applicant
Mr. Njuguna holding brief for Mr. Ngugi for Respondent
Muturi: Court clerk