**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1068 of 1998**

**THIKA COFFEE MILLS LTD..... PLAINTIFF**

**versus**

**COFFEE BOARD OF KENYA..... DEFENDANT**

**RULING**

This application is by way of a Chamber Summons dated 6th May 1998 saidto have been brought under Order XXXIX and Older L of the Civil Procedure Rules;Section 3 of the .Judicature Act (Chapter 8 Laws of Kenya); Section 25(8) of theJudicature Acts 1873-75 (presume of England); The Coffee Act (Chapter 333 Lawsof Kenya) and all subsidiary legislation made there under; the Constitution of Kenya,Sections 3 A and 63 of the Civil Procedure Act (Chapter 21 Laws of Kenya); theinherent powers of the Court and all other enabling powers and provisions of law.

The Applicant is represented by Mr. Nowrojee, Mr. Makhecha, Mr.Wandabwa and Mr. Wagara while the Respondent is represented by Mr. Paul Muite,Mr. Chege Kirundi, Miss A Mbugua, Mrs. V. Barasa and Mr. Mureithi.

The Applicant before me is the Plaintiff, Thika Coffee Mills Limited, and the

Respondent is the Defendant Coffee Board of Kenya in the main suit filed by a plaintalso dated 6th May 1998. The Chamber Summons and the plaint were filed in thiscourt together on 7th May 1998.

Prayer (A) in the Chamber Summons was acted upon when, on 13th May1998, I gave directions for the Interpartes hearing of prayer (C). I refused to grant anexparte interim order in terms of prayer (C) and insisted on an interpartes hearingbefore any order in terms of prayer (C) could be made. Prayer (B) is therefore spentand it is prayer (C) only which remains in issue and has been the subject of longsubmissions before me, taking seven, if not eight, days.

However, prayer (C) in the application (the Chamber Summons) is the sameas prayer (A) in the plaint filed for the main suit.

The Plaintiff's Applicant is a limited liability company incorporated and carrying on business in Kenya. the Defendant/Respondent is a statutory body corporate established and governed under the Coffee Act, Chapter 333 Laws of Kenya..

In former years the Defendant was the sole agent, miller and marketer of coffee in Kenya.

It is the Plaintiff/Applicant's contention that in recent years, the coffee industry was liberalized and the

Defendant's/Respondent's monopoly came to an end.

Applicant continues that following that liberalization, the applicant, with others, applied for various licenses. The Respondent issued some of them but did notissue others and there were long delays from 1993 to 1997 in respect of licencesrequired by the Applicant.

There were therefore constant communications between the Applicant, theRespondent and the parent Ministry of Agriculture, the Applicant complaining aboutthe Respondent's inaction and delay.

Finally the Ministry of Agriculture, from 20th February 1997, wrote to theRespondent giving the Respondent directions, under section 6(7) of the Coffee Act,concerning the complaints raised by the Applicant.

It is the Applicant's contention that the Respondent failed or refused to comply with the Ministry's directions contrary to the provisions of section 6(7) of the Coffee Act which is mandatory and docs not therefore give the Respondent a discretion.

Prayer (C) in the Chamber summons is therefore asking this court, at this stage, to make orders against the Respondent, referred to in that prayer as the Defendant, that:

"The Defendant, by itself, its officers, servants membersor agents or otherwise howsoever be restrained fromimpending, interfering with or otherwise howsoeverdelaying or stopping the exercise by the plaintiff of itsrights, interest, and entitlements under the licences,permits, exemptions and instruments directed by theMinister of Agriculture to be issued by the Defendant tothe Plaintiff by the said Minister's written directions to theDefendant dated 20th February 1997, and expressly including:

(a) Coffee Movement Permits;

(b) Commission agency Licence;

(C) Commercial Coffee Milling Licence;

(d) Coffee Warehouseman's Licence,

(e) Coffee broker's Licences;

(f) Other instruments such as certificates.

And by the said Minister's written directions to the Defendant dated24th October, 1997, expressly including:

(g) The instrument exempting the plaintiff from theprovisions of S.21, Coffee Act, Cap.333; and

(h) The necessary movement permits and certificates inrespect of coffee falling under the said exemption,including certificates of origin or re-export, and from otherwise howsoever causing the said impediment,interference, delay or stoppage or attempting the same or attempting tocause the same until the hearing of this application inter-partes/until thedetermination of this suit,"

The Minister's first directions to the Defendant/Respondent, seen above, were contained in a letter dated 20th February 1997 signed by the then Permanent Secretary Ministry of Agriculture, Livestock Development and Marketing, Professor Karega Mutahi. After referring to certain letters from which he said issues regarding the present status of the Coffee Industry had emerged, namely, the issues concerning the issuing of Coffee permits, licensing of the Commercial Coffee Millers, Commission agents, Coffee brokers, ware housemen and Coffee marketing agents in accordance with the Coffee Act, the Permanent Secretary said:

"The Ministry continues to receive strong presentations onthe need for more changes in the Coffee subsector. In thepast, the organizations demanding the change have beenadvised that they should sell their ideas to the Coffeegrowers who should accept their proposals before theycame to us. However, it is noted that the Board, as themarketing agent, has been facilitating the selling offarmers coffee. It organizes the sale of the Coffee throughthe Central Coffee Auction to accomplish the process ofselling and buying of Kenya Coffee.

In the Coffee (Mills, Milling, and Management)Rules, 1994 the 'authorized agent' means a personauthorized by the Board to deal in Coffee up to thedelivery of clean Coffee to the Central Auction, and, the'authorized marketing agent' means any person, authorizedby the Board, to hold any licences issued under the Actand includes any person exempted in writing by the Boardfrom holding such licence.

The Board, as a farmer's organization, is required toallow other farmers' organizations and commercial millersor planters to become marketing agents provided that theowners of coffee appoint them as such, and are paid theirdues minus appropriate statutory deductions and otherrelevant expenses contractually agreed upon with theplanters. The Board, in this particular regard, wouldcompete with other farmer's organizations and companiesin the function of coffee marketing.

I have discussed the frequent letters, coming to thisMinistry, on the marketing functions with the Minister. Itis agreed that the Board should issue the instruments orlicences to the Kenya Planter's Co operative UnionLimited, Thika Coffee Mills Limited, Socfinaf Limited,and Gatatha Farmers' Co operative Society Limited forCoffee Marketing and Commission agencies. This willenable them to offer their services of milling, andmarketing of coffee as agents delivering cured coffee tothe auction on behalf of fanners. The Minister directs thatthese instruments be issued soonest preferably before 28thFebruary, 1997. The instruments should include thefollowing:-

(a) Coffee movement permits

(b) Commission agency licences

(c) Commercial Coffee Milling licences

(d) Coffee Warehouseman's licences(C) Coffee Broker's licences

(f) Other instruments such as certificates.

In directing the above the Minister strongly stressedthe tact that the Board should be a watchdog on behalf ofthe farmers. It should, therefore, allow farmers who trustthese organizations to appoint them as their Coffeemarketing agents to market Coffee in accordance with theagreements signed between them. The Board shouldensure mat such agreements exist and protect farmers'interests.

Please take action and let the Ministry know whenthe action becomes effective. However, this should be soonest.

The second letter concerned Thika Coffee Mills only and was written by the Minister himself, then Hon. Darius M. Mbela on 24th October, 1997. Addressed to Mr. A.O. Murunga, as General Manager, Coffee Board of Kenya, the letter states:-

"I have received a letter addressed to me by theChairman, Thika Coffee Mills in which he has complainedthat your board has failed to issue the firm with thefollowing documents.

(1) Licences which the firm has applied for;

(2) The Instrument exempting the firm from theprovisions of Section 21 of the Coffee Act,

(3) The necessary movement permits and certificates inrespect of the coffee falling under the

exemption.

The above complaints indicate that your Board has ignoredthe instruction and guidelines conveyed to you vide ourletter No. MOA/LDM/b.l/2A Vol.13 of 20th February1997 by the Permanent Secretary.

These instruction and guidelines are expected to beimplemented to ensure stability in the liberalised CoffeeIndustry. Your Board must also ensure that there isfairness in dealing with partners in the Coffee Industry. Inthis respect, I wish to advise your Board to holdconsultations to resolve any disputes that may arisebetween the main players in the Coffee Industry instead ofresorting to threats or withholding licences and permits. Indealing with other partners Coffee Board of Kenya mustalways remember that it is the industry regulator. Thisfunction requires a high degree of trust and confidence in the Coffee Board of Kenya, by all other actors in theindustry. In turn trust and confidence will only emergewhen CBK undertakes to consult its partners and dialoguewith them, in particular your Board must always winfarmers on its side because these are the owners of thecoffee. For this reason I do not expect to see any debatebetween farmers and CBK appealing in the mass media.

Finally, could you attend to the complaints raised byM/s Thika Coffee Mills and ensure that the necessarylicences, permits and instruments are issued to the firmimmediately."

Those are the Minister's directions this case is about. They are said to have been issued under section 6(7) of the Coffee Act which imposes a statutory duty upon the Respondent to carry out the Minister's directions. It is the Applicant's submission that the Respondent cannot breach that duty and come to court to resist carrying dirty hands, that there should be no delaying, implementing the Minister's directions which are in consonance with Government Policy mat there should be competition in the marketing of coffee, that the Respondent has admitted refusal to implement the Minister's directions and being in breach of statutory duty, should be restrained; that the Respondent breached the Rules of Natural Justice making itself judge in its own cause; that the Respondent's Circular No. 451 dated 17th June 1996 directing payments to be made direct from the Respondent to farmers and Circular 454 of 28th February, 1997 and the letter to the Applicant dated 30th May 1997 were intended to block the implementation of the Minister's directions and those are mere examples;that the Respondent had no power to deem anything as that power is reserved toParliament, that the Respondent was using threats and intimidation; that what theRespondent is doing has caused harm, and continues to cause harm, deliberate harm,not only to the Applicant but also to the Public thereby causing irreparable lossotherwise the Applicant is having a prima facie case with a probability of success;that in case of doubt the balance of convenience shows that the injunction be grantedbecause the loss to the public is great that if the Minister's directions were illegal orultra vires the Respondent should have taken up the matter in court should havesought judicial review. The Board kept quiet and cannot come now to say thedirections were illegal.

The Applicant goes on to say that section 6(7) is mandatory and theRespondent had no power to ignore the minister's directions even if those directionswere illegal; that the Respondent has no power to say those directions are illegal orultra vires or void; that the Board being an implementing body, cannot question aGovernment Minister's action; that the Respondent is fearing to loose monopoly ofthe marketing of coffee, monopoly of income from coffee, the fearing of acompetitor; that the Coffee Marketing Board is not the sole marketing body undersection 4(1) of the Coffee Act, the same with sections 10, 13, 14 and 15 of the Act, they need no amendments to allow other marketers in the Coffee Industry competewith the Respondent, that section 32 providing for appeals does not apply to theApplicant because there has never been a refusal by the Respondent in terms of thatsection as the Respondent had merely ignored the Minister's directions; mat mere wasno basis for the Respondent to appoint an inspector to inspect the Applicant for thepurpose of being appointed a Commissioner Agent as such inspection was not in theMinister's directions nor does it feature in the provisions of the Coffee Act, that inany case the Applicant has always been open to inspection and it was the Applicant'sappointed inspector himself who failed to carry out the duties assigned to him by theApplicant, that the Respondent was trying to enforce its own draft regulations whichdo not have the basis of law as those regulations have not been enacted as required,that there was no prescribed form of an application to be exempted under Section 21of the Coffee Act as a letter like the one dated 17th February 1993 from the Applicantto the Respondent was sufficient, further that Section 21 is independent of any of thesections of the Act

relating to licensing.

It was towards the end of submissions by the Applicant on the last day of thehearing of this Chamber Summons mat counsel for the Applicant tried to clarify matthe Applicant wanted to be a Commissioner Agent to market coffee within theCentral Auction System and not outside. Although this is difficult to see from the Chamber Summons. Otherwise, it had all along appeared as if the Applicant hadwanted to market coffee outside the system, and there are annextures to theApplicant's Replying Affidavit dated 6th July, 1998 supporting this line of things.

The Respondent's position has therefore been that the Act and its regulationsstipulate that anybody wishing to participate in the marketing of coffee in Kenya mustobtain a Dealers "A" Licence and thereafter proceed to participate in the marketingthrough the Central Auction System; that the Act and its regulations give theRespondent regulatory and supervisory power over the Coffee Industry in Kenya andthat if the Applicant wishes to join the Coffee Industry, the Applicant must accept thepatronage and supervision of the Respondent because this is necessary for the goodof Coffee farmers and the Coffee Industry.

The Respondent's case continues that for liberalization to take place, lawsgoverning the Industry must be amended by Parliament and the Ministry ofAgriculture will be instrumental in formulating the necessary amendments; that afteramendment by Parliament, the Minister after consultation with the Respondent will formulate the necessary amendment rules and regulations; that Coffee belongs tofarmers whose interest must be protected as large sums of money involved and theCoffee Industry is important for the economy of this country; that not only is that factrecognized in the provisions of the Coffee Act but also in the decision of the Cabinet the relevant minutes of which was conveyed to the Respondent by the Permanent Secretary Ministry of Agriculture in a letter dated 27th February 1998. The relevant part of the minute 101/96 of 9th January 1997 states:

"The Cabinet noted the recommendations of the paper anddirected that-

(a) Any miller organization that wishes to sell farmer'scoffee and therefore handle proceeds thereof shoulddeposit Kshs. 1 billion bank debenture with theCoffee Board of Kenya (CBK). The debentureshould be from approved Commercial bank.

(b) The Central Auction System of Coffee be continuedfor now without allowing private treaty arrangements.

(c) CBK allow more auctioneers to be appointed by themarketing agency to conduct the auctioneering

(d) Required rules of conducting the auctioneering beimmediately worked out by the Ministry and CBKand that such rules include a minimum time periodbefore the hammer falls.

(e) Revision of the Coffee Act, Cap 333 be carried outto reflect the liberalized situation.

(f) .....

The Minister for Agriculture LivestockDevelopment and Marketing and the Attorney-General totake the necessary action."

It was further submitted that the Cabinet being the Executive Arm of theGovernment its decision binds every Minister as such decision forms GovernmentPolicy and therefore a Minister's directions which are contrary to a decision of theCabinet like the Ministers directions in question here are rendered in effective; thatthe Applicant has not satisfied this court that the Applicant has satisfied theconditions set out by the Cabinet such as making a deposit of one billion KenyaShillings; and marketing coffee through the Central Auction System; that the Cabinetwas also aware of the necessity to amend the Coffee Act and specifically stated so;that the Applicant is saying it does not want a Dealers "A" licence meaning theApplicant wants to be left completely free to buy coffee where it wants and sell thatcoffee where it

wants by private treaty, yet without amendments to the Act andregulations, everybody who wants to be a Commission agent must apply for a Dealers"A" licence which will entitle him participation at the Central Auction.

Annexure PN 1 to the Respondents Replying Affidavit was pointed at asevidence that the Applicant does not want a dealers "A" licence.

It was pointed out that a policy decision by a Minister or Cabinet cannotoverride the express provisions of an Act of Parliament as the Act must be amendedto contain the Policy before the Policy is implemented in the four Corners of the Act.Otherwise the Act of parliament prevails. It was emphasised that the Respondent must observe certain conditions in its exercise of its statutory power under the CoffeeAct and that the Minister's directions must also be confined within the four cornersof the statute if the Minister expects the Respondent to carry out those directionswithout the necessity of amending the Coffee Act first. If therefore the Minister'sdirectives are outside the four corners of the Act, the Respondent has no obligationto implement them as the Respondent would have no power to do things outside theprovisions of the Coffee Act and should not be forced by unlawful directions of theMinister to do what is unlawful as the Applicant is saying that it wants to beexempted from all the provisions of the Coffee Act. Since that Act does not give theRespondent power to grant such exemption, the Respondent should not and cannotgrant the exemption.

The Respondent's case continues that since Section 21 requires the Respondentto grant exemptions within that section only, the Respondent would have no powerto use Section 21 to grant exemption from the operation of Section 13 or Section 14or section 15 as demanded by the Applicant; that even under Section 21 the onlyparagraph available to assist the Applicant is paragraph (d) where persons other thanPlanters like the Applicant can benefit, and that even under paragraph (d) theexemption relates only to purchase of Coffee from a Coffee Planter and thatexemption must relate to a particular bunch of identifiable coffee. It means the Minister has no power to direct the Respondent to exempt the Applicant from theoperation of the rest of the provisions of the Coffee Act. Consequently before theMinister directs the Respondent under Section 6(7) of the Act it is imperative for theMinister to identify the power of the Respondent within a particular section of theAct, the power which should also be identifiable by the Respondent itself before theMinister directs the Respondent to act under that section. Otherwise if the Ministerwants the Respondent to act outside the Coffee Act the Minister must either use hispower under Section 38 of the Coffee Act to amend the regulations to the Coffee Actor he must first cause amendments done in the Coffee Act itself before giving thosedirections to the Respondent. When bringing about those amendments the ministermust bear in mind that such amendments must be for the better carrying out of theprovisions of the Coffee Act for the better development of Coffee Industry in Kenyafor the benefit of Coffee farmers in general.

It was pointed out that while the Respondent has been doing its best to bringabout the desired amendments, the Minister has been and is doing nothing on thoselines. The Task Force for liberalization appointed by Coffee Farmers DelegatesConference looked into the whole issue of liberalization and prepared a report whichwas later approved by the Delegates Conference and was forwarded to the Ministerfor implementation. The Task Force had taken into account the interests of Coffee Farmers, the Coffee Industry and the Nation at large. The interest of all stake holdersin the Coffee Industry. The Coffee Industry will be happy to have more licensedCoffee dealers.

The report of the Task Force reflects what should be done in the CoffeeIndustry for the purpose of liberalization. They rejected, for example, the idea of aCommercial Agent being a Commercial Miller except for K.P.C.U. The ApplicantThika Coffee Mills, being a Commercial Miller, is asking for what the farmersrejected through the Task Force and the Delegates Conference. They decided theCentral Auction System be maintained. Sale of Coffee by private treaty was rejectedas it would ruin the Coffee Industry. A dealer who wishes to buy and export Coffeemust obtain a Dealers "A" licence and if one wants to be a Commission Agent onemust apply to the Coffee Board of Kenya to be appointed. There were conditions tobe fulfilled like a deposit of Kshs1 billion in Banker's Cheque from one of thenamed banks. These are lawful and careful manner by which the Respondent ishandling the question of liberalization.

These proposals were forwarded to the Minister in September 1995 for actionbut to-date no action has been taken. It is the Ministry of Agriculture to blame.

It is the Respondent's case that Thika Coffee Mills has not to date made anyapplication to the Respondent for the licences or for the exemptions the Coffee Mills wants following the Minister's directions in question here and that if suchapplications had been made, Thika Coffee Mills would have availed itself of theopportunity to appeal under section 32 of the Coffee Act and would not have had tocome to this court with this suit. There is a dispute between the Applicant and theRespondent as to whether there are prescribed forms of applications in this respect.But the Respondent insists that whether there are prescribed forms or not, the fact thatthe Applicant has not availed itself of the use of Section 32 of the Coffee Act toappeal is in itself proof that Thika Coffee Mills has not cared to make any suchapplications to the Coffee Board of Kenya. It was therefore submitted that ThikaCoffee Mills is wrong in blaming the Coffee Board of Kenya for failure to issuelicenses and grant exemptions when Thika Coffee Mills had failed to make thenecessary applications to put themselves within the operation of Section 32 of theCoffee Act to have their problems solved within the Act instead of coming to thiscourt.

I pose here saying that I was told much more from each side during thehearing of this Chamber Summons. But I think what I have already referred to isenough for the purpose of this ruling. I may also not need all the case authoritiescited before me.

What I have already referred to sets out, in short, the dispute before me no. I have been informed during the hearing of this application that the Applicant has alsofiled or is filing or has filed but is with drawing a separate case whereby he is askingthe High Court to grant a prerogative order of Mandamus to compel the Respondentto carry out its statutory duties which the Applicant is saying in the application beforeme now that the Respondent has failed to perform. In that same case the applicantfurther seeks the granting of a prerogative order to prohibition to prohibit theRespondent from canceling the licences already granted to the applicant; frominterfering with the Applicant's normal business operations in production, primaryprocessing, milling, extension services, crop advances and marketing coffee.

Advocates for the Applicant, Mr. Nowrojee and Mr. Makhecha, say the remedythe Applicant is seeking against the Respondent in that other case is separate anddifferent from the remedy the Applicant is seeking against the Respondent in this caseH.C.C.C. No. 1068 of 1998 in which this Chamber Summons, before me now, isfiled.

Leave to file that other case was granted by the High Court in H.C. Misc.Application No. 476 of 1998. That case does not concern us here to-day but it issuggestive of the multiplicity of cases the parties may have in this matter if the partiesare not going to be careful to avoid being bogged down in endless litigation.

Going back to the Chamber Summons I am handling now, I have said that prayer (C) which I am being asked to grant is the same as prayer (A) in the plaintfor the main suit which is yet to be heard. Before considering the other aspects of theChamber Summons therefore, a fundamental question arises as to what effect thegranting of this application will have on the still pending main suit.

I have been referred to the case of GHANI AND OTHERS V JONES (1970)1 Q.B. 693 as authority that I should grant prayer (C). In that case the police who hadrefused to return to the plaintiff the documents the police had taken from the Plaintiffduring a search in the Plaintiff's house were sued by the plaintiffs for a mandatoryorder for the delivery up of the passports and documents, an injunction restraining thedetention of the documents and damages for detinue. While hearing of these mainclaims was still pending, the plaintiffs filed an interlocutory application in which theysought release of the passports and documents as they wished to visit Pakistan.

That is, the prayer for the release of the passports and documents in theinterlocutory application was substantially the same as the prayer for the release of thesame documents in the plaint. The court granted the prayer, in the interlocutoryapplication for the release of the passports and document before the main suit washeard.

That is an English case decided sometime in 1969. Three factors to be noted.First that case was based on matters of a criminal nature where murder had been committed but the police were merely suspecting the plaintiffs; and even after takingthe passports and documents from the plaintiffs, no one had been arrested andcharged with murder. That is, there was a requirement for the police to act quicklyand decisively. Although the police gave affidavit evidence of their belief that therehad been murder and that they would apprehend those concerned and that in the eventof charges being preferred some of the documents would be of evidential value andothers of potential evidential value and that the plaintiffs could help the policeinquiries and that if they left the United Kingdom they might not return, the courtfound that the police were guilty of delay and was not therefore persuaded by whatthe police said.

The second factor is that the court found the police action to have been illegal.

The third factor is that the matter touched upon the fundamental right of thePlaintiffs to freedom of movement.

The first factor only may be said to be in the suit filed by the Applicant herein;but only as to the element of delay. The element criminality is absent. Howevereven with that being so, the facts of the delay still remain to be stabled during thehearing of the main suit. The other two factors: the illegality and the fundamentalright of the freedom of movement are missing from this case completely. It istherefore my humble opinion that that case is distinguishable from the instant case.

The Applicant quoted what I may describe as Omnibus provisions of the lawas the ones under which this Chamber Summons has been brought, but that shouldnot blind us from the fact that the main provisions of the law are Section 63 (C) and(e) of the Civil Procedure Act and Order XXXIX Rules (1) and (2) of the CivilProcedure Rules. Those are the provisions for granting injunctions and are specificthey are about temporary injunctions and interlocutory orders - in pending suits.

Such temporary injunctions and interlocutory orders have to be sought wherethere is a suit pending and not where is it stated in those provisions that the temporaryinjunction or interlocutory order be granted to decide or to substantially decide thesuit in which the Chamber Summons seeking for those temporary orders has beenfiled. There is nothing about mandatory or permanent injunctions or mandatoryinterlocutory orders. It is therefore my humble view that parties do overstretch theapplication of those provisions when they file Chamber Summons under OrderXXXIX praying for Mandatory or Permanent injunctions or praying for mandatoryor permanent interlocutory orders aimed at deciding or substantially deciding the mainsuit.

In any case, as Mr. Justice Talbot said in the case GIIANI v JONES :( Ibid)

"It is exceptional to grant, before trial of the action, aninterlocutory injunction which gives substantially the reliefclaimed in the action, and in particular to make a mandatory order. Furthermore, before doing so, the courtmust be quite clear that the right exists."

I do not think the Chamber Summons before me falls within the exceptionalcases in which the injunction being prayed for should be granted. Although much hasbeen brought to my attention during the hearing, the position is that granting prayer (e) *in* the Chamber Summons will substantially decide the main suit on mere affidavitevidence before that evidence is adduced, tested, canvassed and evaluated during thehearing of the main suit to enable the court ascertain clearly and definitely whetheror not the rights being sought exist before those rights are granted.

I do not know the judge who will hear the main suit. But even if I knew; itmakes no difference. That judge is the one who will see witnesses and observe theirdemeanors as the witnesses will be giving evidence producing the documents filedand not yet filed here and it is that judge who will see that evidence tested, canvassedand is the one who will evaluate that evidence to establish whether or not the rightsthe Plaintiff" now Applicant, is asking for, exist before those rights may be granted inthis contentious matter where the Defendant, now Respondent, is saying that thoserights do not exist because mere directions from the Minister for Agriculture in theabsence of necessary and facilitating

Parliamentary amendments to the Coffee Actand its regulations and in disregard of Cabinet policy decisions, cannot confer a lawfully enforceable right upon the Plaintiff or anybody else liberalizationnotwithstanding.

The judge who will hear the main suit will be in a position to go deeper into allthe issues and many others which have been mentioned in these proceedings butwhich I need not go into. In this Chamber Application before me, I am not in thatposition. Moreover, my decision on prayer (C) in the Chamber Application(Summons), in favour of the Applicant, will not be binding upon that judge and Icannot foretell what his decision will be on prayer (A) in the plaint.

I would not like to lay ground for inconsistency or contradiction in orderscoming from the same Court (High Court) in the same suit on the same issues so thatit is found that one judge of the High Court has overruled another judge of the HighCourt in the same suit on the same issues do not know how the advocates who are appearing before me in this ChamberApplication would look at it or would like it if I grant this application to-day, so thatThika Coffee Mills obtain the licences and exemptions, and the next day or a year orso latter my learned sister or brother in the High Court after hearing the main suitdecides that such licences or exemptions should not be granted to Thika Coffee Mills.How will the position look like in the Coffee Industry bearing in mind the vaguenessin prayer (C)? Will there not be chaos contributed to by the court.

In this respect I think it is an abuse of the process of the court to seek to obtainthrough an interlocutory application (in the instant case, through a ChamberSummons) orders which ought properly be only sought through the hearing of themain suit and I find the Applicant guilty of this abuse in the Chamber Summonsbefore me.

With all due respect, this is one suit where, I think, the parties should havegone straight to the hearing of the main suit without taking this court's time to hearthis interlocutory application.

I know there has emerged what I may call a bad practice in civil litigation inour courts of law, especially in the High Court that every plaint filed in the courtmust be accompanied with or followed by one or a line of interlocutory applications.Normally it is a line of interlocutory applications that follow. Otherwise most partiesfile plaints for the purpose of filing interlocutory applications. The result is thatparties waste a lot of their time, money and energy on those interlocutory applicationsso that at the end of it all, a great majority of them get exhausted and go to sleep,perhaps in order to rest, but forgetting that they have left the main suit pending. One,two or more years will pass so that when someone one day raises a question as to whythe main suit is still pending, there is an easy and ready answer at their finger tips asthere is always the usual scapegoat available. The reply: "It is the court which has kept the case pending"This implies magistrates and judges in our courts are lazy or inefficient and cannottherefore dispose off cases expeditiously. Far from the truth.

As Mr. Babu Achieng, the Chief Magistrate at Nakuru Chief Magistrate'sCourt was recently quoted to have rightly said: In all instances where there had beendelays in the process of the administration of justice, magistrates, and I add judges,have been made to shoulder other people's crosses. In my opinion, the parties, mostlytheir advocates are to blame. They should bear the lion's share of the blame ondelays.

This kind of practice, in my view, has contributed a lot to the accumulation ofcases in our courts as, not only is a court's work in one case unnecessarily duplicatedbut also multiplied yet many plaints arc filed every day in almost every court.

In the instant case I have already taken not less than seven days hearing thisChamber summons. More time is still required of me for the same ChamberSummons. More interlocutory applications may be expected in this suit if the presenttrend is anything to go by. More of the court's time for this same suit may thereforestill be required before the main suit is heard; and should that hearing start, nobodywill remember that a lot of the court's time had already been taken on matters outsidethe main hearing of the suit.

Apart from what I have just said, there is the fact that after the High Court'sdecision in an interlocutory application, there is the possibility of an aggrieved partyappealing to the Court of Appeal, as it is likely to happen after this ruling to-day.Hearing of the main suit is thereby further delayed by the time the parties will takebattling in the Court of Appeal before they descend back to the High Court cither formore interlocutory applications or, and this is rare, for the hearing of the main suit.

In that respect, I think it is also an abuse of the process of the court for a partyor parties in a suit to unnecessarily duplicate or multiply the work load of the courtas that causes delays in the administration of justice. Here again the Applicant isguilty of this abuse as the seven or more days I have taken hearing this applicationshould have been better used hearing the main suit had the parties been keen onhearing the main suit instead of coming in with this Chamber Application.

What 1 am saying now may be called a digression but 1 think, it is a digressionrelevant to the issues I am discussing.

I have said above that my handling of the Chamber Application before me hasplaced me in a position where I am being called upon to make decisions which maybe contradicted or overruled by the judge who will have better evidence, (than theevidence before me) during the hearing of the main suit. In the circumstances, I donot find myself in a happy position because I would have liked to be in a position where my decision could only be overruled by the Court of Appeal and not by mysister or brother judge in the High Court.

But since I find myself in this position I think the best thing I should do is tomerely express doubt on some of these issues where my decision is called for becausesomeone else will make proper decisions on those issues later.

First there is a dispute whether Thika Coffee Mills made any applications forthe licences/or exemptions the company is alleging the Coffee Board of Kenya hasfailed to give. At the beginning it looked as if the Plaintiff Company had not madeany application because it was thought the Minister's directions were sufficient tomake the Defendant act. When it was argued for the Defendant that there had to beapplications in prescribed forms, the Plaintiffs side seemed lost for some time butrecovered latter to claim that there were no prescribed forms and that a mere ordinaryletter was sufficient.

Otherwise I thought it would have been better for the Plaintiff to have attachedto the Chamber summons copies of specific applications for the various licences andexemptions the Plaintiff had made and the Defendant had failed to grant. Thosecopies of applications should have been treated the way the letters said to contain theMinister's directions were treated in this application.

Failure to do that, and the inability of the Plaintiff to avail itself of the provisions of Section 32 of the Coffee Act concerning appeals where an applicationis refused by the Coffee Board of Kenya, makes it doubtful whether the Plaintifftruly made any of the applications the Plaintiff is talking about in this Chamberapplication.

The Plaintiff says it applied for various licences. The Defendant issued somebut did not issue some. Those not issued should have been clearly and specificallystated and copies of the relevant applications annexed, if truly the plaintiff applied forthem.

I must say mat I find it difficult to ascertain the extent to which the Court,order granting prayer (C) in the Chamber Application would be. It seems to meprayer (C) is set out in vague terms for the purpose of enabling the Plaintiff doanything with the Court's order if prayer (C) is granted.

Which licences are the Plaintiff saying the Defendant should not interferewith? Which licences are the Plaintiff saying should be issued by the Defendant?The Plaintiff has a Commercial Coffee Milling Licence. What others does thePlaintiff have? They are not disclosed. I think a precise set out of what the Plaintiffwants in prayer (C) was necessary in view of evidence like in annexture PN. 1, a letterdated 23rd September 1996, and annexture PN.17, a letter dated 4th February 1998,both attached to the Plaintiffs

Replying Affidavit dated 6th July 1998. The Plaintiff does not want a dealer's "A" licence because it is not suitable. But the plaintiff wants to be a marketing agent and a Commission Agent able to buy and sell coffee by private treaty.

Wants to use the Coffee Exchange facilities and the Central Auction System independently from the operation of the Defendant and if the Defendant refuses, the Plaintiff is prepared to use an alternative facility elsewhere. In the Plaintiff's intention to commence marketing coffee, the Plaintiff does not think it illegal promoting Kenya Coffee in the world independent of the Defendant and before the Defendant issues marketing licences as demanded by the Plaintiff. The sale by private treaty is to be to the highest bidder in the world. In view of these together with what is said about exemptions, I highly doubt whether the Plaintiff is coming out openly and this may be the cause of the trouble. With regard to exemptions, they can only be granted in respect of the provisions of Section 21 of the Coffee Act, the operative words being: "Exempt any person from any of the provisionsOf this Section..... " That does not allow for exemption from other Sections like Section 13 or Section 14 or Section 15 of the Coffee Act.

The Judge who will hear the main suit will have better evidence to look at that issue. The Judge will also have better evidence to look at other Sections like Section 4( 1) which gives the Coffee Board of Kenya the responsibility for the promotion of the Coffee Industry including marketing and processing of coffee, the Licensing and Control of producers and processors of coffee, and the research connected with the Industry. He will read that Section together with Section 6(7) Section 13, Section 14 and Section 15 to see whether the directions of the Minister under Section 6(7) Override the clear and specific provisions of those other Sections. Section 6(7) of the Coffee Act itself is clear that when acting in accordance with general or special directions of the Minister, the Respondent must be at the same time also acting in the exercise of its powers and in the performance of its functions under the Coffee Act Section 6(7) itself says that and I see nowhere in the Act where the Respondent is empowered to exercise powers and perform functions outside the provisions of the Coffee Act Section 13(1) states:

"Subject to subsection (2), no person shall(a) buy, sell, export, mill, warehouse or otherwise dealin or transact any business in Coffee unless he is theholder of a current licence thereto authorizing him,issued, in its discretion, by the Board."

I doubt whether the Minister's directions under Section 6(7) take away the

Board's specific and statutory discretion conferred by Section 13(l)(a) just quoted above. Section 14 sets out the kinds of licence issued under Section 13 and Section 15 says that before issuing any of those licences the Board "Shall consult the Advisory Committee" and that the Board shall not issue such a licence to any person unless:

"(a) it is of the opinion that the person is a fit and properperson to hold such a licence; and

(b) in the case of a dealer's "A" licence the AdvisoryCommittee is satisfied that the person has sufficientknowledge or experience properly to conduct thebusiness or employs on the staff of the business aperson with such knowledge or experience."

I doubt whether those conditions can be satisfied without an inquiry by the Board and whether the Minister's directions under Section 6(7) remove those specific statutory conditions or requirements.

I should also point out that under section 13, any person who contravenes theprovisions of Subsection (1) of that section or acts in contravention of the conditionsof any licence granted there under shall be guilty of an offence and shall be liable toimprisonment with or without corporal punishment.

That means Parliament viewed those provisions with seriousness and I doubtwhether the Board, acting under the Minister's directions in section 6(7), is entitled or has the power to aid any person contravene section 13(1).

Then there are regulations made under Section 38 of the Act which give theRespondent more powers and

functions under the Act.

With better evidence than that so far tendered before me, the Judge hearing themain suit will also have to look at the two letters relied on as containing the Minister'sdirections.

First is the letter dated 20th February 1997 which clearly was signed by theMinistry's then Permanent Secretary Professor Karega Mutahi. Looking at that letter,the Permanent Secretary wrote it for the Ministry and not for the Minister. That letterwas written by the Permanent Secretary and not by the Minister. A question arisesas to whether a letter written by a Permanent Secretary can, under Section 6(7) of theCoffee Act, be construed to have been written by his Minister. I doubt whether thatquestion can properly be answered in the affirmative.

If that letter is not the Minister's letter I highly doubt whether its contents canbe called the Minister's directions. Perhaps they should be called the PermanentSecretary's directions if indeed they qualify to be directions. Section 6(7) does notgive the Permanent Secretary powers to give directions to the Respondent. It is theMinister himself to give directions and should do so personally.

If that is the position, is the second letter better? It is dated 24th October 1997 and was signed by the Minister himself Hon. Darius M. Mbela. It begins:

"I have received a letter addressed to me by the Chairman,Thika Coffee Mills in which he has complained that yourboard has filed to issue the firm with the followingdocuments:"

The letter goes on to list the documents and then points out to the addressee, General Manager, Coffee Board of Kenya, that the complaints indicate that the Respondent Board has ignored the instruction and guidelines conveyed

"Vide our letter No. MOA/LDM/b:l/2A Vol.13 of 20thFebruary 1997 by me Permanent Secretary."

Firstly that confirms what I have said earlie*r* that the letter dated 20th February1997 was of the Permanent Secretary and not of the Minister himself. Otherwise theletter was their letter as opposed to his letter. The Ministry's letter as opposed to theMinister's letter. Section 6(7) talks of the Minister and does not talk of the Ministry.

Secondly from the opening statement the Minister was addressing himself toThika Coffee Mill's complaint.

Thirdly the Minister points out that what were contained in the letter dated 20thFebruary 1997 were

"Instruction and guidelines."He does not say they were directions under Section 6(7) of the Act.

Fourthly those instruction and guidelines were only expected to be implemented. They were not mandatory.

Notwithstanding the language used in the final paragraph which, of course,must be read with the powers and discretion given to the Board by the Act in mind,I doubt whether that letter can properly be said to contain directions to the Boardunder Section 6(7) of the Coffee Act.

The question is how should the minister give directions under Section 6(7) ofthe Act? Should those directions not be set out in a precisely formal manner todistinguish them from ordinary letters answering complaints so that people do not relyupon contents of ordinary letters claiming those contents are the Minister's directions?

The directions may or may not be required to be published in the Kenya Gazette but should they not be something like:

"IN EXERCISE of the powers conferred by section 6(7)

of the Coffee Act, 1 B Minister for Agriculture,

Livestock Development and Marketing do hereby directthe Coffee Board of Kenya to... "

I think these questions should properly be answered during the hearing of themain suit when witnesses will testify and will be cross examined.

On the whole therefore, since at this stage the affidavit evidence I have is notsufficient to enable me resolve the issues before me with absolute conviction withoutfacing the danger of being overruled later by my colleague High Court judge who will have better evidence at the hearing of the main suit by seeing and observing witnessesgive evidence and tested; hearing that evidence canvassed and thereafter evaluatingthat evidence; himself; and in view of my having held that the filing of this ChamberApplication is an abuse of the process of the court, and further, due to the fact thatI have expressed a number of doubts on a number of key issues in this ChamberApplication, and think that, on the balance of convenience, this Court should notintervene at this stage, I do resolve not to grant prayer (C) in the Application.

Accordingly the Plaintiff's/Applicant's Application by Chamber Summonsdated 6th May 1998 herein be and is hereby dismissed with costs to theDefendant/Respondent.

Dated and delivered in an open court room at Nairobi this 24th day of July,1998.

**J.M. KHAMONI**

**JUDGE**