



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & GATEMBU, J.J.A.)

CIVIL APPEAL NO. 171 OF 1993

BETWEEN

KENYA NUT COMPANY LIMITED APPELLANT

AND

KENYA FARM NUT CO-OPERATIVE SOCIETY LTD. 1ST RESPONDENT

HORTICULTURAL CROPS DEVELOPMENT AUTHORITY 2ND RESPONDENT

CONSOLIDATED WITH CIVIL APPEAL NO. 172 OF 1993

HORTICULTURAL CROPS DEVELOPMENT AUTHORITY APPELLANT

AND

KENYA FARM NUT CO-OPERATIVE SOCIETY LIMITED RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Shields, J.) dated 8th October, 1993

in

H.C. Misc. No. 830 of 1993)

JUDGMENT OF THE COURT

1. By an application dated 10th September, 1993, Kenya Farm Nut Co-operative Society, (hereinafter referred to as “**the 1st respondent**”), commenced judicial review proceedings vide Miscellaneous Cause No. 830 of 1993 at Nairobi seeking an order of mandamus to compel Horticultural Crops Development Authority, (hereinafter referred to as “**the 2nd respondent**”), to issue it (the 1st respondent)

with a licence to facilitate exportation of macadamia nuts. The 1st respondent also sought an order directed to the 2nd respondent not to interfere with and/or obstruct the 1st respondent's trade of purchasing, processing and exportation of macadamia.

2. The application was supported by a statutory statement and an affidavit sworn by **Johnson M. Muhara**, the General Manager of the 1st respondent. He stated that prior to filing Misc. Cause No. 830 of 1993, there was a related suit, **Misc. Cause No. 546 of 1992** at Nairobi, where the parties were Kenya Nut Company Limited versus the Attorney General with Kenya Farm Nut Co-operative Society Ltd named as an interested party.

3. In that suit Kenya Farm Nut Co-operative Society Ltd opposed an agreement allegedly entered into by Kenya Nut Company Ltd and the Attorney General because the agreement intended to divest the interested party of its legal right to buy, process and export macadamia nuts.

4. When the said suit came up for hearing on 17th December, 1992, pursuant to an issue raised by the interested party's advocate, the proceedings were terminated by the court (Shields & Githinji, JJ.) and costs of the suit awarded to the interested party. That notwithstanding, the 2nd respondent refused to issue an export licence to the 1st respondent to enable it ship to Hawaii a consignment of macadamia nuts valued at more than Kshs. 6 million. That was the basis of seeking the orders in Misc. Cause No. 830 of 1993.

5. The 2nd respondent filed grounds of opposition and stated, *inter alia*, that there was nothing to show that the 1st respondent had applied for an export licence and/or that it qualified for such a licence under the **Agriculture Act**. The 2nd respondent added that it had power to refuse to grant a licence under **paragraph 4(1) of Legal Notice No. 188 of 1972**.

6. The 2nd respondent's manager, **Martin A.S. Mulandi**; swore a replying affidavit and stated, *inter alia*, that the 1st respondent had not applied for any licence to export macadamia nuts. The person who had applied for such a licence was **Kenya Farm Nut Multipurpose Co-operative Society Ltd**. He added that on 20th July, 1993 the 1st respondent had approached the 2nd respondent for a licence to export macadamia and a letter purported to be appropriate authority was issued by a person who had no power to do so; consequently the said letter was revoked shortly thereafter. Mr. Mulandi stated in his letter dated 29th July, 1993 that there was an order that had been issued in Misc. Application No. 546 of 1992 in favour of appellant herein, who was then a monopolist in macadamia export industry.

7. The appellant through one of its directors, **Yoshiyuki Sato**, filed an affidavit as an interested party. He stated that the 1st respondent had not served its application upon the interested party yet it was directly affected by the orders sought. The appellant said that it could only make a substantive response to the 1st respondent's application upon receipt and perusal of the application.

8. The 1st respondent's application was argued before Shields, J. In his judgment, the learned judge considered, *inter alia*, the provisions of Legal Notice No. 188 of 1992, and in particular the reasons for which an export licence could be refused. He observed that the 1st respondent duly applied for an export licence but the same was rejected, not because it did not meet the stringent requirements applicable then, but for the reason stated in the letter from the 2nd respondent's Managing Director dated 29th July, 1993, that is, existence of an order in favour of the appellant in Misc. Application No. 546 of 1992 that had already been terminated.

9. The circumstances leading to the termination of the aforesaid case were that by a letter dated 26th April, 1992 the Minister for Agriculture had written a letter to the 1st respondent authorizing them to export macadamia nuts. The appellant sought an order of certiorari to quash that authorization. The authorization was withdrawn by the Minister vide a letter dated 23rd November, 1992 before Misc. Application No. 546 of 1992 was heard. As there was no authorization in place when the matter came up

for hearing, the substrum of the case was no longer there and the case had to be terminated.

10. The learned judge observed that the appellant and the Minister of Agriculture had suppressed any opportunity for the 1st respondent to support the validity of the authorization. He further noted that the termination of the said case had nothing to do with the 1st respondent's application for a licence to export macadamia nuts. He came to the conclusion that the 2nd respondent had failed to perform its statutory duty in accordance with the law and issued an order of mandamus compelling the 2nd respondent to issue to the 1st respondent with the export licence as sought.

11. But during the hearing of the 1st respondent's application, **Mr. Nowrojee, Advocate**, endeavoured to intervene in the proceedings on behalf of the appellant herein, Kenya Nut Company Limited, on the basis that the company was an interested party and should have been served with the proceedings by the 1st respondent so that it could be heard in opposition to the application.

12. However, the learned judge observed that the reason why Kenya Nut Company Limited, the appellant, wanted to be served with the proceedings as an interested party was to seek to preserve its *de facto* monopoly in the export of macadamia nuts with the connivance of the Ministry of Agriculture and Horticultural Crops Development Authority. Such a monopoly could not legally be enjoyed by the appellant, the court held; adding that the appellant had no right to take part in or be served with the proceedings.

13. That judgment gave rise to these appeals which were consolidated and heard together. The first one, Civil Appeal No. 171 of 1993 was filed by Kenya Nut Company Limited. The second one, Civil Appeal No. 172 of 1993 was filed by Horticultural Crops Development Authority. The lengthy memorandum of appeal by the 1st appellant (No. 171 of 1993) dated 9th December, 1993 consists of thirty (30) grounds of appeal. In a nutshell, the appellant contends that the learned judge erred in law in failing to find that the appellant was a **“person directly affected”** by the orders that had been sought by the 1st respondent. Consequently, it ought to have been served with all the court papers by the 1st respondent to enable it participate fully in the proceedings.

14. In the second appeal, No. 172 of 1993, Horticultural Crops Development Authority (2nd respondent) in its memorandum of appeal dated 10th December, 1993 raises twenty (20) grounds of appeal. The 2nd respondent argued, *inter alia*:

- i. that the learned judge misdirected himself in stating that the 1st respondent had applied for an export licence.
- ii. that the learned judge disregarded the law on grant of export licences.
- iii. the learned judge misdirected himself on the principles applicable in grant of an order of mandamus.

15. The court directed counsel for the parties to put in written submissions after which they were to be allocated a limited period of time to highlight the same. When the appeals came up for hearing, **Mr. Mogeni** appeared for Kenya Nut Company Limited, the appellant in Civil Appeal No. 171 of 1993 whereas **Mr. Wandabwa** appeared for Horticultural Corporation Agricultural Authority, the appellant in Civil Appeal No. 172 of 1993 and **Mr. Kihara** appeared for Kenya Farm Nut Co-operative Society Limited, the 1st respondent in Civil Appeal No. 171 of 1993.

16. Mr. Mogeni submitted, *inter alia*, that the appellant was a person directly affected by the orders sought by the 1st respondent as defined under **Order 53(2)** of the **Civil Procedure Rules** which provides as follows:

“(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings

in or before a court, and the object is either to compel the court or an officer thereof through any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and to all parties in the proceedings.”

Mr. Mogeni cited several authorities in support of that submission, among them **ABDUL WAHEED SHEIKH v ABDUL SHAKOOR SHEIKH & ANOTHER, (1982-88) 1 KAR** where this Court held that the rights of a party likely to be directly affected by the result of an appeal should not be affected without the party being provided with an opportunity of being heard.

17. At the time of the hearing of the High Court matter there were several suits that were pending in court between the appellant and the 1st respondent, to wit, High Court Miscellaneous Suit No. 546 of 1992, High Court Miscellaneous Application No. 793 of 1993 and High Court Civil Case No. 4590 of 1993. There was also a suit filed by the appellant against the Commissioner of Monopolies relating to export of macadamia nuts. The appellant had filed several affidavits which showed that its participation in the proceedings before court was crucial and necessary. The export consignment consisted of a produce whose development had been financed by the appellant and which was the only one authorized to export the same. Counsel therefore submitted that the learned judge erred in law in failing to allow the appellant to be heard before determination of the 1st respondent's suit.

18. Mr. Wandabwa for the 2nd respondent, who is also the appellant in Civil Appeal No. 172 of 1993, did not oppose Appeal No. 171 of 1993. In respect of his client's appeal, he submitted that Kenya Farmnut Company Limited had never applied for a macadamia export licence which could have been considered by the 2nd respondent. The appellant had not complied with the rules made under Legal Notice No. 188 of 1972 which stipulates the procedure for applying for such a licence, including payment of the requisite fees; Kshs.100/=. That had expressly been stated by Mr. Mulandi, the 2nd respondent's Managing Director, yet the learned judge held that “it is not denied that the Applicant duly applied for export licence to export the said consignment and it is not seriously argued that the application was not in order.” Had the learned judge considered the affidavit of Mr. Mulandi, he would have arrived at a different conclusion, counsel added.

19. Mr. Wandabwa further submitted that the learned judge erred in failing to appreciate the principle that where the State imposes a duty and leaves discretion as to the mode of performance on a public body, an order of mandamus cannot issue to command that the duty be carried out in a particular way. Under the Horticultural Crops Development Authority Legal Notice No. 188 of 1972, the 2nd respondent is authorized to issue or to refuse to issue export licences for horticultural crops. In exercising that discretion, the Authority considers various factors, guided by the appropriate Rules. If the 2nd respondent had refused to consider a valid application for export licence, the High Court could only issue an order of mandamus compelling the 2nd respondent to consider the application but not to compel it to grant the licence, as was the case here. This Court's decision in **KENYA NATIONAL EXAMINATIONS COUNCIL v REPUBLIC Ex parte Geoffrey GATHENJI & 9 OTHERS [1997] eKLR** was cited in support of the above submission.

20. Mr. Kihara for the 1st respondent opposed the two appeals. In respect of the first one, he submitted that the trial judge was right in refusing Mr. Nowrojee's application to adjourn the hearing so that the appellant could be served with the application. In his view, the appellant was fully seized of the proceedings and it ought to have stated its grounds of objection to the mandamus application. The learned judge therefore exercised his discretion judiciously in granting the orders sought; counsel stated.

21. With respect to the second appeal, Mr. Kihara submitted that the 2nd respondent was abusing its statutory power by refusing to issue macadamia nuts export licence to the 1st respondent and by unlawfully perpetuating the appellant's monopoly in the macadamia nuts industry. Counsel stated that the 1st respondent had made a formal application for the export licence. He referred to a statutory application form at page 19 of the record of appeal that was completed and submitted to the 2nd respondent on 20th

July, 1992 following which the 2nd respondent wrote a letter on the same day stating that it had no objection to “M/S KENYA

FARMNUT MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD, of P.O. Box 335, Murang’a exporting FRUITS, NUTS, VEGETABLES and CUT FLOWERS within the calendar year 1993”.

22. However, we note that the application in question had been submitted by **KENYA FARMNUT MULTI-PURPOSE CO-OP SOCIETY LTD, P.O. Box 335 Murang’a** and not **KENYA FARMNUT CO-OPERATIVE SOCIETY LTD**. Mr. Kihara did not tell the court whether these were two different companies or whether there was a typographical error in making the application. He did not also tell the court whether the requisite application fees had been paid.

23. We have carefully considered the record of appeal as well as the written and oral submissions that were made by counsel. The first issue for determination is whether there was a legal obligation on the part of the 1st respondent to serve upon the appellant the application for mandamus.

Order LIII rule 3(1) (as it then was) of the **Civil Procedure Rules** required that after grant of leave to apply for an order of mandamus, prohibition or certiorari, the application be made within 21 days by notice of motion.

Rule 3 (2) thereof states:

“(2) The notice shall be served on all persons directly affected....”

24. The applicant is required to file an affidavit giving the names and addresses of and place of service in respect of all persons who have been served with the application. If on the hearing of the motion the court is of the opinion that any person who ought to have been served has not been served, it may adjourn the hearing so that the person is served. It is therefore evident that the law places a very high premium on the issue of service of judicial review applications upon any person who may be directly affected by the orders sought. Even on the day of the hearing, any person who desires to be heard in opposition to the motion and the court is satisfied that he is a proper person to be heard, the court would still hear him, notwithstanding that he had not been served with the motion. See **Order LIII rule 6** (as it then was).

25. The learned judge, in holding that the appellant was not an interested party stated that:

“I interpret „interested party? as being a person with a real interest, that is one who has a legal right to be protected or asserted.”

The judge however held that Mr. Nowrojee had been shy in formulating his client’s legal right which required protection. However, the appellant, upon learning that the 1st respondent had moved to court to seek the order of mandamus aforesaid, even without any knowledge of the contents of the motion, had an affidavit sworn by one of its directors setting out its involvement in those proceedings and other related ones and how it was going to be affected by the orders sought. It annexed thereto a letter from the 1st respondent’s advocates then, Ngatia & Associates, which made considerable reference to the appellant.

26. Subsequent to the filing of the aforesaid affidavit, on the hearing day, Mr. Nowrojee appeared before the court and did his best to convince the learned judge that the appellant was directly affected by the application that was before it and therefore not only wanted to be served but also wanted to be heard in opposition to the motion. The learned judge acknowledged that the appellant’s interests may be affected commercially by a judgment against the defendant but it could not be said that it would be legally affected.

27. In judicial review, who is a person directly affected? In **REGINA v RENT OFFICER SERVICE & ANOTHER ex parte MULDOON, [1999] 1W.L.R. 1103 at 1105** the Court held:

“That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency.”

The question before the trial judge is whether the appellant demonstrated or established a case falling within the province of the law defined as affected or interested in the outcome. We think the appellant create a case to make him/it participate or being permitted before court. The 1st respondent knew that the appellant’s rights would be jeopardized or prejudiced by its failure to participate, therefore it was incumbent to be served with the application. By that failure, the appellant sought redress and was therefore entitled to participate. One important and fundamental issue which the Hon. Judge failed to recognize is that if the commercial right or interest of the appellant would be affected, then that could automatically and *ipso facto* determine his rights. We would therefore say that if a person is likely to suffer any detriment or loss as a result of a decision which may be made, unless an intermediate intervention is made, that the person is directly affected and therefore ought to be served and given an opportunity to be heard in opposition to the application.

26. On the basis of the foregoing, we think the learned judge in trying to distinguish the manner in which the application was going to affect the appellant was plainly in error. It was sufficient for the appellant to demonstrate, as it did, that it was going to be financially affected by the motion. On that score alone, the appellant was entitled to service of the notice of motion. The judge erred in holding that the appellant had no right to take part or to be served with the proceedings.

27. We now turn to Civil Appeal No. 172 of 1993. The first issue for determination is whether the 1st respondent actually applied for an export licence in terms of the applicable law. **Paragraph 3 of Legal Notice No.**

188.of 1972, the Horticultural Crops Development Authority (Export) Order states as follows:

“No person shall export horticultural crops from the date of coming into effect into operation of this order, unless he is in possession of a valid export licence issued to him by the authority.”

Paragraph 4 of the said order requires that every application for an export licence to be in Form 1 in the schedule and to be accompanied by a fee of Kshs.100/= which is refundable to an applicant in case the authority refuses to grant a licence. Where an export licence is issued in response to an application made as stated hereinabove, the licence has to be in Form 2 in the schedule and is valid for the period expressed therein. Paragraph 5 of the said Order makes it an offence for anyone who contravenes the provisions of paragraph 3 and such an offence is punishable by a fine not exceeding Kshs.1000/= or to imprisonment for a term not exceeding one month.

28. We have already stated that the application that was submitted to the second respondent on 20th July, 1992 was by Kenya Farm Nut Multipurpose Co-operative Society Limited and not by Kenya Farm Nut Co-operative Society Limited. It can therefore be said that the 1st respondent did not submit any application for a licence to export macadamia nuts. But even if it were to be presumed that the application submitted on 20th July, 1992 was made by the 1st respondent, there was no evidence that it was accompanied by the requisite fees. It was the responsibility of the 1st respondent to satisfy the court that it had submitted an application that was valid in every respect as stipulated under Legal Notice No. 188 of 1972.

30. Further, no export licence in conformity with paragraph 4 (2) of the said Order was ever issued to the 1st respondent. Instead, the 1st respondent exhibited a letter dated 20th July, 1993 that simply stated that the 2nd respondent had no objection to **Kenya FarmNut Multipurpose Co-operative Society Limited** to export fruits, nuts, vegetables and cut flowers within the calendar year, 1993. That cannot be a licence as required under **Order 4(2)**. The mere submission of an application without all the prerequisite conditions and precedents cannot be equated to a proper and valid application. The submission of a mere application without the necessary requirement is first an intention but cannot fulfill the legal requirement of a proper application. We think that was made an intention without any basis and no obligation or right could be

derived from such an act.

31. It is therefore clear that no valid application was ever made by the 1st respondent for export of macadamia nuts and neither was any export licence for the same issued to it by the 2nd respondent. We would however agree with the learned trial judge that there was no order that had been issued by the court in Miscellaneous Civil Case No. 546 of 1992 which would have restrained the 2nd respondent from considering an appropriate application for export licence by the 1st respondent or any other person.

32. We now wish to consider whether the learned judge misdirected himself in law in considering the applicable principles in granting an order of mandamus. In so doing, we need to consider the scope and efficacy of such an order. In **Halsbury's Laws of England**, 4th edition volume 1 at page 111 it is stated as follows:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

33. At paragraph 90, the learned treatise states that:

“The order must command no more than the party against whom the application is made is legally bound to perform.

Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

34. The above principles were considered by this Court in **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC ex parte GEOFFREY GATHENJI NJOROGE & OTHERS (supra)**. In the appeal now before us there is no dispute that it is the second respondent which had a statutory duty of considering applications for export of macadamia nuts. In performing that duty, the 2nd respondent was exercising its discretion in conformity with the applicable law and regulations. If the 1st respondent had demonstrated to the court that it had submitted a valid application to the 2nd respondent but the latter had refused to consider it or having considered it rejected the application in a manner that amounted to wrongful exercise of discretion, then the 1st respondent would have been perfectly entitled to move to court and seek an order of mandamus to compel the 2nd respondent to perform its statutory duty of considering the application.

35. An applicant cannot seek an order of mandamus to compel a licensing body to grant it a licence, it can only seek such an order to compel the licensing body to perform its statutory duty of considering the application, which may thereafter be granted or rejected. Likewise, mandamus cannot be used to enforce performance of a discretionary duty. In this instance, the power to grant or refuse an export licence was vested in the 2nd respondent, who stated the reasons for refusal to grant the licence sought. We are satisfied with the reasons given and the refusal.

36. On the basis of what we have stated hereinabove, the inescapable conclusion is that the learned judge erred in law in granting an order of mandamus to compel the 2nd respondent to issue an export licence for macadamia nuts to the 1st respondent. In arriving at this conclusion, we reiterate that in judicial review proceedings the court is not concerned with the merits of a decision made by a respondent but rather the process through which that decision was made. It does not lie within our mandate to determine whether

the alleged monopoly in macadamia industry in favour of the appellant was right or not.

37. For the foregoing reasons, we allow these appeals and set aside the decision of the High Court delivered on 8th October, 1993. The 1st respondent shall bear the costs of the appeal.

Dated and Delivered at Nairobi this 24th day of April, 2015.

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR