REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal 295 of 2003

GRAIN BULK HANDLERS LIMITED …….....
APPELLANT

AND

J. B. MAINA & CO. LTD.

COAST SILOS (K) LIMITED

KENYA PORTS AUTHORITY …….....
RESPONDENTS

(Appeal from the judgment of the High Court of Kenya at Mombasa (Lady Justice Khaminwa) dated 8th August, 2003

in

H.C.MISC.APPL. NO. 479 OF 2003)

****

JUDGMENT OF THE COURT

This is an appeal against the Order of the superior court, Mombasa, (Khaminwa J) dated 8th August, 2003 whereby the superior court granted leave to the 1st and 2nd respondents in this appeal to file a judicial review application for three orders of prohibition and an order of mandamus and further ordered that the grant of leave do operate as a stay of several decisions of Kenya Ports Authority (KPA) in favour of Grain Bulk Handlers Limited (GBHL), the appellant herein.

The application for leave was made jointly by J. B. Maina & Co. Ltd, 1st respondent, through Deche Nandwa & Bryant Advocates and Coast Silos (K) Ltd, 2nd respondent through M/s. Balala & Co. Advocates. The applicants sought leave to apply for:

"***1.An order of prohibition directed to KPA to prohibit it from any further action under and pursuant to a Licence Agreement dated 17/12/2002 charging GBHL the tariffs contained in that Agreement.***

2. An order for prohibition directed to KPA prohibiting the determination, impositing grant or levying of any tariffs save as provided by Kenya Ports Authority Act (Act) Cap 391 Laws of Kenya and

in the tariff Book prescribed by the said Act.

3. An order for prohibition directed to KPA prohibiting, the determination imposition, grant or levying of any tariffs that have the effect of under preference or undue disadvantage or creation of monopoly to the benefit of single service provider.

4. An order of mandamus directed to KPA requiring them not to exercise the powers vested in them by the Kenya Ports Authority Act … save in accordance with the said Act and according to the law".

The applicants also sought an order that:

"***5. The grant of leave do operate as a stay of the proceedings in question to wit, the aforesaid decisions and operations of the said reductions and illegal monopoly tariffs including, inter alia, the said Licence Agreement dated 17th December, 2002 and all other contracts and consequential orders arising thereto made by the respondent so that only the application of the rates in the statutory Tariff Book 1995 are maintained until the determination of this judicial review application or until the Honourable Judge orders otherwise".***

The application was allowed in a short extempore ruling thus:

"***COURT:***

Upon perusing the application, supporting affidavit and statement and upon hearing submissions of counsel I am convinced that there is need for a Judicial Review of the matters complained of.

I grant leave to the applicants to file application for judicial review as prayed under prayer 1, 2, 3 and 4. The leave granted shall operate as a stay in terms of prayer 5 thereof.

The notice of motion for Judicial Review shall be filed within 21 days from today and shall be served upon all parties interested".

The appellant filed 14 grounds of appeal most of which relate to the challenge of the order granting leave to apply for judicial review except grounds nos. 2, 11, 12 which specifically fault the order of stay thus:

"***2. The learned judge erred in law in directing that the grant of leave do operate as stay of the proceedings in question.***

11. The learned judge erred in directing that the grant of such leave do operate as a stay of the proceedings in question as prayed for by the first and second respondents which is in the nature of a mandatory injunction.

12. The first and second respondents by their delay of 3½ years in applying for mandamus and prohibition were not entitled to either leave or stay".

By prayer (b) in the memorandum of appeal, the appellant prays that the orders granting leave and stay be set aside and the application for leave be dismissed. By prayer (c) the appellant, in the alternative to (b), prays that the order of stay be set aside with costs.

At the hearing of the appeal, Mr. Nowrojee, learned counsel for the appellant, informed us that the appeal against the grant of leave and prayer (b) in the memorandum of appeal had been withdrawn vide a consent letter filed in Nairobi *Civil Application No. 245 of 2003* between the parties to this appeal and that the appeal is only against the order no. 5 that the grant of leave do operate as a stay of proceedings in question. The respective counsel accepted that as the correct position.

The background to the dispute is contained in paragraph 3.1.1 to 3.6 of the Statement accompanying

the application for leave. Those paragraphs show that the 1st and 2nd respondents are aggrieved by several agreements and decisions of KPA which cumulatively gave GBHL both the sole monopoly in the provision of port services particularly grain handling facilities and preferential tariffs to the exclusion of other competitors.

The 1st and 2nd respondents aver that those decisions and agreements were unlawful and utra vires the Kenya Ports Authority Act Cap. 391 (Act). The Statement in particular refers to six agreements, namely,

(i) The first agreement dated 24.12.1992, which among other things, permitted GBHL to erect silos for the loading and unloading of grains, fertilizers from ships, the storing, warehousing of grains and fertilizers in bulk for a period of 45 years at an annual rents for Shs.9,000/=.

(ii) The second agreement dated 4.11.1994 by which KPA leased its land LR. No. Mombasa/Block 1/400 to GBHL for a term of 82 years for use for bulk grain and fertirlizer handling terminal.

(iii) The third agreement dated 21.8.1995, a certificate of lease showing that GBHL had charged KPA's land leased to it to various financial institutions to secure various loans.

(iv) The fourth agreement a variation agreement dated 6.3.1998 in respect of the wayleave agreement granting GBHL a wayleave for 45 years giving to GBHL and the right to construct and operate an integrated terminal for storage of grains and fertilizers in bulk and to use and operate an overhead mechanical conveyor system.

(v) The fifth agreement dated 6.3.1998 – a variation of the lease allowing GBHL to assign, sublet and transfer possession of the land leased to it without KPA's consent.

(vi) The sixth agreement dated 17.12.2002 – "Licence Agreement" granting sole monopoly to GBHL for 8 years at preferential tariff rates.

It can be discerned from the application for leave however, that it is the Licence Agreement dated 17th December, 2002 that the first and second respondents intend to challenge through judicial review. The two respondents complain, among other things, that the Licence Agreement grants GBHL preferential tariff rates of USD 1.50 per tonne for stevedoring and USD 0.5 per tonne for shorehandling making a total of USD 2 while charging other competitors like 1st and 2nd respondents USD 6 for stevedoring and USD 5 for shorehandling – total USD 11.

The second respondent Coast Silos (K) Ltd states that its application to KPA for permission to build and construct grain storage silos together with overhead conveyor system and to lease KPA's land was rejected. According to the 1st and 2nd respondents the financial implications of the monopoly granted to GBHL is a loss by the respondents of opportunity to make profits and a loss of about Shs.400 million in tariffs annually by KPA since year 2000.

Before we deal with the grounds of appeal, it is convenient at this early stage to deal with two points of law raised by Mr. Balala, learned counsel for the 2nd respondent.

First, he submitted that since leave and stay are given at the same time and stay is dependent on leave, an order for stay cannot be challenged on its own. He relied on the case of ***Republic v. Commissioner of Co-operatives***, Exparte ***Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd*** [1999] 1 EA 245 where this Court said at page 247 paragraphs e, f:

"***From the provisions we have set out, it is clear to us that a judge has no power to separate the granting of leave*** "*exparte*" ***from the issue of whether or not such leave shall act as a stay. The judge must decide at the stage of granting leave whether or not such a grant shall act as a stay. There is no power to make one portion of the chambers summons exparte and the other portion of it to be heard***

"inter partes" ……".

It is ***Rule 1 (4)*** of ***Order LIII*** *Civil Procedure Rules* (CP Rules) which gives power to court to order a stay of proceedings. It provides:

"***The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge otherwise orders".***

However, as Mr. Balala has correctly submitted, the grant of leave is independent of the grant of stay. Indeed, a judge, can, in exercise of discretion grant leave but decline to order that the grant of such leave should not operate as a stay of proceedings in question. The decision relied on does not support the contention that one cannot challenge the grant of stay without at the same time challenging the grant of leave. The case of ***R v. Pollution Inspectorate, Exparte Green Peace Ltd*** [1994] 4 All ER 321 which Mr. Balala cited to show the principles on which stay is granted is a complete answer to the issue. In that case, the judge granted leave to apply for judicial review but refused to grant an interlocutory stay for 2 weeks. The applicant appealed with leave to the English Court of Appeal against the order refusing to grant an order of stay. The appeal was however, dismissed. (See also ***R v. Secretary of State for Education*** [1991] 1 All ER 282).

Secondly, Mr. Balala in answer to the submission that 1st and 2nd respondents failed to disclose material facts to the superior court submitted that if that were so, then the appellant was at liberty to apply to the same judge to set aside the grant of leave. There is indeed, ample authority that an exparte order such as the order granting leave and stay is in its nature provisional and can be set aside by the same court which granted it (see ***Minister of Foreign Affairs Trade and Industry vs. Vehicle and Supplies Ltd*** [1991] 4 All ER 65; ***R v Secretary of State – Exparte Herbage*** [1987] 1 All ER 324).

In ***Njuguna v Minister for Agriculture*** [2000] 1 EA 184, this Court said at page 186 paragraph g:

"***The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the Court, to the judge who granted leave, to set aside such leave".***

Rule 17 of order L of *Civil Procedure Rules* now specifically gives jurisdiction to any court to set aside an order made "*exparte*". It provides:

"***The court may set aside an order made "exparte".***

It seems in this case that the appellant did not at first apply to the superior court to set aside the exparte order granting stay. Had the applicant invoked the jurisdiction of the superior court instead of appealing it is probable that the dispute could have been resolved and this appeal might not have been necessary.

Nevertheless, the fact that the appellant had another remedy does not take away its right of appeal if such right exists in law. The order appealed against is an interlocutory and discretionary order. We doubt, without deciding, whether indeed such order (order of stay) is appellable as of right under ***order XLII*** *CP Rules*. That issue was not however raised or argued before us, and we say no more about it.

This is also a convenient stage to deal with a jurisdictional issue raised by Mr. Amoko, learned counsel for KPA. He submitted in support of the appeal, among other things, that the power of the High Court to grant stay is limited by the phrase "*operate as a stay of proceedings"* in ***order LIII (1) (4)***; that the phrase is a technical term of art which should be given effect; that stay of proceedings does not relate to executive actions and that the decision of KPA cannot be described as proceedings. He particularly, referred to the ***Jamaica*** case of ***Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Limited & Another*** [1991] All ER 65; ***R v Secretary of State for Education and Science Exparte Avon County Council*** [1991] 1 All ER 282 and ***Mike J.C. Mills & Another v The Posts &***

Telecommunications, High Court Misc. Application No. 1013 of 1996. (unreported).

In the first case ***(Vehicles Supplies Ltd)*** the Jamaica law gave a minister of government power and discretion to allocate a quota of vehicles to be imported by dealers. The Minister in pursuance of that statutory authority allocated quotas of vehicles to retail motor dealers which quotas the dealers found unsatisfactory. The dealers applied for leave, *inter alia*, to apply for an order of certiorari to quash the allocations and further sought an order that:

"***all allocations of quotas and/or proceedings consequent on the said allocations be stayed pending a final determination of this matter".***

The Privy Council construed the phrase "*stay of proceedings"* contained in a rule in Jamaica Civil Procedure Code similar to ***Rule LIII (1) (4)*** to mean proceedings in court or tribunal and as excluding executive decision which had already been made.

In the second case, that is, ***Exparte Avon County Council*** the Secretary of State for Education and Science of England by an order granted a school "*grant- maintained status"*. The ***Avon County Council*** applied for leave to apply for judicial review and that:

"***Direction that the grant of leave to apply for judicial review should operate as a stay on the implementation of the proposal for Beechess Cliff School to become grant – maintained until the determination of the application".***

Although The High Court granted leave but declined to grant stay, although the appeal against the refusal of stay was ultimately dismissed by the English Court of Appeal, the Court nevertheless construed the words: *"Stay of proceedings"* in RSC ***Order 53 rule 3 (10)*** which is identical to our ***Order LIII rule 1 (4)***, in relation to decision making bodies to embrace the process by which the decision challenged was reached including the decision itself.

In the ***Mike J.C. Mill's*** case, Ole Keiwua J (as he then was) while setting aside an order of stay of proceedings, nevertheless, followed ***Exparte Avon County Council*** in preference to ***Vehicles and Supplies Ltd*** and held that the word "*Proceedings"* in *order 53* is not restricted to judicial proceedings but do encompass the decision and determinations such as to levy charges for services rendered by a Corporation – a statutory body.

Mr. Amoko referred to the criticism of the decision in ***Exparte Avon County Council*** by the authors of ***Judicial Review*** by Michael Supperstone QC and James Goudie QC, Butterworths 1992.

Despite the eloquence of Mr. Amoko and his forceful submissions, we think, however, that this case is distinguishable from both the ***Vehicles and Supplies Limited*** and ***Exparte Avon County Council***. In those two cases, the decision sought to be stayed was an executive decision made by a Minister of Government in pursuance of statutory power and discretion.

The decisions sought to be stayed in this case are made by KPA – a statutory body which is also a body corporate which has power to sue and be sued in its corporate name (see ***Section 3 (2)*** of Cap 391).

The main reason why the Privy Council rejected an order of stay of proceedings in ***Vehicles Supplies Ltd*** was that the order was in effect an indirect injunction which was not available against a Minister of Government in an ordinary action. The Privy Council said at page 71 paragraphs g, h:

"***If it was desired to compel the appellant, assuming this were possible, to revoke the allocation or issue – counter – instructions that was something which could be achieved only by injunction, either mandatory or prohibitory for which an appropriate application could have had to be made".***

That is also one of the main criticism levelled against ***Exparte Avon County Council*** by the authors of ***Judicial Review*** (supra) Chapter 10 at page 250 last paragraph thus:

"***The reasoning also fails to address the fact that a "stay" of a ministerial administrative decision is identical in all but name to a prohibitory injunction. If there is no jurisdiction to grant an injunction against a Minister, it, cannot have life breathed into it merely by the device of calling it something else".***

KPA unlike a Minister of government can be sued in ordinary action and prohibitory and mandatory injunctions can lawfully be granted against it.

For those reasons, the decisions in the ***Vehicles and Supplies Ltd*** and ***Exparte Avon County Council*** are not directly relevant to this case and we do not find it necessary to decide which of the two decisions should be applied in our jurisdiction.

That is not, however to say that we should not adjudicate in this case whether the decisions which were stayed by the superior court are "*proceedings"* envisaged by ***Rule 1 (4)*** of ***Order LIII*** CP Rules.

We now turn to the grounds of appeal before us.

Mr. Nowrojee, learned counsel for the appellant, gave several reasons why the learned Judge wrongly exercised her discretion. Some of his submissions, in our view, go to the merits of the application for judicial review which is still pending in the superior court for hearing. Mr. Nowrojee submitted, for instance, that no stay is possible when judicial review is not possible; that judicial review does not apply to contracts; that there was no basis for stay; that KPA had manifest jurisdiction to enter into contracts; that the Licensing Agreement does not breach the KPA Act and that the monopoly relied on did not affect the first and second respondents.

Those are some of the grounds upon which the Judicial Review application is apparently resisted. They undoubtedly raise contentious matters which cannot be resolved in this forum. By granting leave to apply for Judicial Review the superior court must have been satisfied that there was a *prima facie* case for Judicial Review. (See ***Njuguna v Minister for Agriculture***)– supra. The appeal against the grant of leave has now been withdrawn. We would in the circumstance refrain from expressing any view on those contentious matters as such a view would be preemptory and perhaps embarrassing to the trial Judge.

Mr. Nowrojee further contended that the learned Judge did not refer to the principles for granting stay nor give reasons for granting stay and that the absence of reasons is evidence that the discretion was erroneously exercised. We do not, with respect, agree with that submission. Failure to state the principles for the exercise of a judicial discretion or to give reasons for the exercise of discretion does not *per se* prove that the discretion has been wrongly exercised.

In ***Lata v Mbiyu*** [1965] EA 592 the predecessor of this Court when dealing with the discretion to award interest on a money decree said at page 593 paragraph D:

"***Such a discretion must of course be judicially exercised and where as in this case no reasons are given for a judicial discretion in a particular manner it is assumed that discretion has been correctly exercised unless the contrary is shown".***

Moreover, this Court cannot interfere with the exercise of discretion by the learned Judge of the superior court unless on the recognized principles (see ***Mbogo v Shah*** [1968 EA 93).

Mr. Nowrojee has enumerated the relevant factors that the learned Judge did not consider when granting the order of stay. Those factors are *inter alia,* that, the agreements could not be stayed; that the 1st and 2nd respondents were not parties to the contracts they sought to stay; that the stay sought was so wide and beyond what was sought in the Judicial Review application; that the order of stay was in effect an interim mandatory injunction and that there was a delay of 3½ years in filing the application.

The contention by Mr. Nowrojee that the contracts could not be stayed is similar to Mr. Amoko's submission that the decisions of KPA were not *proceedings* which could be stayed.

The word *proceedings* has no precise meaning. It is used with various shades of meaning and can have a narrow or wide meaning depending on the context in which it is used. It can denote a step or day – to – day steps in an action. It can also mean an action (see *Words and Phrases Legally Defined* – 2nd Ed. Vol. 4 page 182).

In this case, the phrase "*stay of proceedings in question*" is used in the context of a Judicial Review application seeking either an order of prohibition or an order of certiorari.

Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions. Having regard to the scope of Judicial Review particularly the orders of prohibition and certiorari, we have no doubt that the phrase "*stay of proceedings in question"* in relation to decision making bodies whose decisions are impugned include the process by which the impugned decision is reached and the decision itself.

That is not the end of the matter for we have still to inquire whether the impugned decisions of KPA constituted "*proceedings"* as defined above.

Although the Statement refers to agreements, leave was granted to apply for three orders of prohibition. The effect of those three orders of prohibition, if granted, is *inter alia* to stop the operation of the License Agreement dated 17th December, 2002 between KPA and GBHL. The order of stay not only stayed the operations of the Licence Agreement dated 17th December, 2002 but also all other contracts and consequential orders arising thereto. KPA is run by a Board of Directors and by ***Section 12 (2) (n) (ii)*** of the Act, KPA has power to enter into an agreement with any person:

"***for the performance or provision by that person of any of the services or facilities which may be performed or provided by the Authority".***

It is not the decisions of the Board of Directors of KPA or of the Managing Director of KPA preceding the six agreements or authorizing the six agreements which are subject matter of the order of stay but the six agreements themselves.

The decisions of KPA to award contracts to GBHL were implemented and crystallized into concrete contracts. Some of the contracts have heavy financial implications. For instance, following the first and third agreements the appellant has spent huge sums of money for the construction of port facilities such as silos and overheard mechanical conveyor system.

Furthermore, as a result of the second agreement (i.e. lease) GBHL has according to paragraph 3.3 of the Statement entered into other contract of charge with four financial institutions who are not party to these *proceedings* whereby GBHL has charged KPA's land to secure about USD 24.5 million advanced to it by the four financial institution.

Whilst the process of reaching the decisions to enter into the six contracts and the decisions to enter into the contracts are infact *proceedings* the implementation of which can be stayed, the six contracts entered into subsequent to the decisions and which have been executed and implemented do not in themselves constitute *proceedings* as envisaged by ***Rule 1 (4) Order LIII*** CP Rules. It follows therefore that the superior court had no jurisdiction to interfere with those contracts through an order of stay of proceedings.

Moreover, we respectfully agree with Mr Nowrojee that the stay order was so wide that it gave the 1st and 2nd respondents more than they seek by the orders of prohibition. It is apparent that leave was granted to apply for orders of prohibition in relation to the tariffs contained in the Licence Agreement dated 17/12/2002. The order of stay prayed and granted covered:

"***decisions and operations of the said reductions and illegal monopoly tariffs including, inter alia, the***

said Licence Agreement dated 17th December 2002 and all other contracts and consequential orders arising thereto…."

The statement shows that the 1st and 2nd respondents were aggrieved by six agreements or contracts including the Licence Agreements between GBHL and KPA. The terms of the order of stay granted seems in effect to suspend the agreements and halt any further implementation of the agreements.

It seems to us with respect that the order of stay granted is so wide, imprecise and ambiguous and it is doubtful whether it is capable of implementation.

The learned judge does not seem to have considered the full implications of the order of stay to the business of GBHL and the provision of Port facilities and services by KPA. The 1st and 2nd respondent concedes in para 6.4 of the Statement that GBHL is a major handler of grain at the Port and has tabulated the tonnage that GBHL has handled for a period of 3 years and 8 months. It is apparent from the Statement and the affidavit which fact is not in dispute that GBHL has invested heavily in the provision of Port facilities to handle the storage of grains and fertilizers in bulk and for the construction of a conveyor system to facilitate the discharge of grains and fertilizers in bulk from ships. In the circumstances of this case, the order of stay is likely to have detrimental financial implications on GBHL and on the provision of Port services by KPA. Indeed, the order is likely to paralyse the operations of the grains and fertilizers handling at the port.

Lastly, we readily agree that the learned judge did not take into account the long and unexplained delay in seeking an order of stay. There is no contention, as submitted by the appellant's counsel, that GBHL has been operating at the port since 15/2/2002. The 1st and 2nd respondents applied for the order of stay on 7/8/2003. The order of stay had the effect of a mandatory injunction compelling KPA to apply tariffs to GBHL as stipulated in the Tariff Book, 1995. It was in our respectful view a wrongful exercise of discretion to deprive GBHL of the contractual rights it had enjoyed for 3½ years through an interlocutory ex-parte order.

For those reasons, we have come to the conclusion that the learned judge did not exercise her discretion judicially in the circumstances of this case and that had she done so, she would not have granted an order of stay. The order of stay was in operation for only a short duration before it was itself stayed by a consent order in January 2004. There is no justification for reviving it at this stage.

The 3rd respondent supported the appeal. It has also incurred costs in this appeal. It is just and fair therefore that both the costs of the appellant and KPA should be paid by the 1st and 2nd respondents in whose favour the order of stay was made.

Accordingly, we allow the appeal and set aside the order of stay of the proceedings made on 8/8/2003. We order the 1st and 2nd respondents to pay both the costs of the appeal and the costs of the 3rd respondent (KPA).

Dated and delivered at Nairobi this 10th day of August, 2006.

P.K. TUNOI

……

JUDGE OF APPEAL

E.O. O'KUBASU

……**……..**

JUDGE OF APPEAL

E.M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR