



Burn Manufacturing USA LLC v Commissioner of Customs & Border Control (Judicial Review Application E069 of 2025) [2025] KEHC 5111 (KLR) (Judicial Review) (29 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E069 OF 2025
RE ABURILI, J
APRIL 29, 2025
(FORMERLY KIAMBU HCJR E004 OF 2025)**

BETWEEN

BURN MANUFACTURING USA LLC APPLICANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL RESPONDENT

RULING

1. The application before this court is the Chamber Summons application dated 14th March 2025. The application seeks for leave to apply for an order of Certiorari quashing the respondent's decision dated 24th February 2025 declining the extension of time to apply for review against offences compounded on 24th July 2024.
2. The application also seeks for leave to apply for an order of Mandamus to compel the respondent to consider the applicant's review. It also seeks leave to apply for an order of prohibition preventing the collection of any taxes by the respondent pursuant to the impugned offences compounded on the said date.
3. In addition to the leave sought, the applicant also seeks that the leave so granted operates as a stay of the decision resulting from the said offences compounded on 24th July 2024 and the letter dated 24th February 2025.
4. The application is predicated upon the grounds in the statutory statement dated 14th March 2025 and the verifying affidavit sworn by Peter Scott who deposes that he is the Director of the Applicant on 14th March 2025.



5. The reasons for leave before commencing judicial review proceedings were explained by Waki J. (as he then was) in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.
6. The Learned Judge further held that leave may only be granted if on the material available, the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant; the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judiciously.
7. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence placed before court and make the decision as to whether the applicant's case is sufficiently meritorious to justify leave.
8. In the instant case, the applicant avers that the respondent in reaching its decision of 24th February 2025 acted in direct breach of section 229(3) of the East African Community Customs Management Act, 2004 by declining to allow the extension of time for applying for a review against the offences compounded on 24th July 2024.
9. According to the applicant, it was denied the opportunity to be heard and to present evidence as its application seeking for extension was declined. Further, that the said decision dated 24th February 2025 was made in excess of the respondent's statutory jurisdiction.
10. To this extent, and in light of the material placed before this Court in the affidavit and the annexures, and upon a cursory perusal of the affidavit evidence before court and without delving into the arguments by the applicant, it is my view that the case is an arguable one to justify leave. It cannot be said to be frivolous or vexatious.
11. On the question of whether the said leave should operate as a stay of the impugned actions by the respondent, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“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 orders otherwise.”
12. In *R (H). v Ashworth Special Hospital Authority* (2003) 1 WLR 127, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the status quo pending the final determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to be stayed has been fully



implemented. In *Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006* the court held that:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”

13. In this case, the applicant seeks to stay enforcement of the respondent’s decision dated 24th February 2025. It is its case that it is likely to suffer substantial loss as the respondent is likely to commence enforcement proceedings against an irregular settlement.
14. As the act of enforcement by the respondent is yet to take place I find that it is in the interest of justice that this court should stay such process at this stage. I therefore grant stay.
15. In the end, I grant leave sought to apply for judicial review orders in terms of prayers 2,3 and 4 as prayed. I also order that such leave so granted do operate as stay of implementation of the respondent’s decision dated 24th February 2025.
16. The substantive motion to be filed and served upon the respondent within 21 days of today’s date in a fresh file.
17. It is so ordered.
18. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF APRIL, 2025

R.E. ABURILI

JUDGE

