



**Coffee Management Services Ltd v Exchange & another (Application E094 of 2024)
[2024] KEHC 6269 (KLR) (Judicial Review) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E094 OF 2024
J NGAAH, J
MAY 31, 2024**

BETWEEN

COFFEE MANAGEMENT SERVICES LTD APPLICANT

AND

NAIROBI COFFEE EXCHANGE 1ST RESPONDENT

CAPITAL MARKETS AUTHORITY 2ND RESPONDENT

RULING

1. By an application dated 2 May 2024, the applicant has sought for leave of this Honourable Court to file a substantive motion for the judicial review orders of certiorari, mandamus and prohibition. The prayers for leave have been framed as follows:

“2. Leave be granted for the Applicant to apply for:

- a. AN ORDER OF CERTIORARI to remove to this Honorable Court for purposes of quashing the decision of the Respondents of 12th April 2024 and 25th April 2024 directing the withdrawal of the Applicant's contracts from catalogues presented to the 1st Respondent auction participation and prohibiting the Applicant from participating in future coffee auctions (the decisions).
- b. AN ORDER OF PROHIBITION restraining the Respondents whether by themselves, their agents or persons acting on their behalf from any further implementation of the decisions.



- c. AN ORDER OF MANDAMUS directing the Respondents to allow the Applicant to participate in the 1st Respondent's auctions as a grower.”
2. The application is expressed to be brought under Articles 23 and 258 of *the Constitution*, Sections 8 and 9 *Law Reform Act*, cap. 26, Sections 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21 and Order 53 Rule 1 of the Civil Procedure Rules, 2010.
 3. Together with the chamber summons have been filed a statutory statement dated 2 May 2024 and an affidavit verifying the facts relied upon sworn on even date by Martin Ngare who has described himself in the affidavit as the general manager of the applicant company.
 4. According to Mr. Ngare, the Capital Markets (Coffee Exchange) Regulations of 2020 provide for the establishment of coffee exchange. The coffee exchange is said to be a company incorporated under the *Companies Act*, 2015 and licensed by the 2nd Respondent as an exchange for trading in clean coffee through auctions.
 5. In trading at the auctions, a coffee grower is allowed to participate through licensed and authorized agents. A direct settlement system (DSS), is required to be established by a commercial bank and managed by a coffee exchange subject to approval by the 2nd Respondent and growers' claims are settled through this system. Accordingly, a grower is required to provide necessary particulars for purposes of settlement.
 6. The 1st Respondent is the coffee exchange established in Nairobi for purposes of conducting the coffee auction. The 1st Respondent is required by law to allow coffee growers to participate in the auctions through their licensed representatives or agents. A coffee grower is defined by law as any person who cultivates coffee in Kenya and may include co-operative societies, unions, associations and estates for purposes of licensing.
 7. By an agreement of 7 February 2017, the Applicant leased several estates and paid a lease to the estates through their representative. The Applicant became responsible for cultivation of coffee estates in accordance with good and sound agricultural practices for the purpose of optimum growing of coffee. In addition, the agreement gives the Applicant power to control the cultivation of coffee, through the management of all aspects of the business of growing coffee such as purchasing of equipment, fertilizers and inputs, accounting, transportation of coffee harvested and marketing of the harvested coffee and any other function necessary for growing coffee. Thus, the Applicant became a coffee grower within the meaning of the law as it was responsible for the cultivation of coffee in the various estates.
 8. By virtue of being a grower recognized in law, the Applicant entered into two separate agreements with two licensed brokers for the sale of their coffee at the 1st Respondent's auction. However, on or about 12 April 2024, the Applicant was notified of a decision by the 1st Respondent directing the Applicant's licensed agent to provide the 1st Respondent with properly executed contracts between the Applicant's licensed agent and certain specified estates, on the basis that it is only estates that are growers and, therefore, should be maintained independently of coffee management services.
 9. On 29 April 2024, the Applicant received a notification from its licensed agent informing it that the 2nd Respondent had directed the withdrawal of its coffee from the auction scheduled for 30 April 2024 and subsequent participations on the ground that the Applicant was not a grower. The 2nd Respondent and the Applicant's licensed agent were scheduled to submit a report on the 10 May 2024 to confirm compliance with the 2nd Respondent's directive, failing which further action would be taken by the 2nd Respondent.



10. According to the 2nd Respondent, the agreement between the Applicant and its licensed agent was contrary to regulation 41 of the Exchange Regulations as the Applicant was not a grower. It is the applicant's case that the decisions by the Respondents barring the participation of the Applicant from the auctions scheduled for 30 April 2024 and 7 May 2024 and all other future auctions are in total violation of *the Constitution* and the law and have caused the applicant loss and damage.
11. The applicant has been advised by its advocates, which advice it verily believes to be true, that Article 47 of *the Constitution* as well as the *Fair Administrative Action Act*, 2015 provide for a right to a fair administrative action according to which any person is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, right to be given written reasons for any administrative action that is taken against them and where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, to give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard.
12. Accordingly, the Applicant seeks to challenge the decisions of the Respondents on the grounds that they are ultra vires and in excess of jurisdiction; they are tainted with illegality; they are based on grave misapprehension of the law and misunderstanding of facts. Those decisions, it is urged, amount to abuse of power; they are based on irrelevant considerations and have failed to consider relevant facts. They are also said to be irrational.
13. When the applicant's application came up for hearing at the first instance, my attention was drawn to prayer 4 in the chamber summons which is to the effect that:

“ This Honourable Court grant the Applicant an exemption to challenge the 1st Respondent 's decision of 12th April 2024 through the instant judicial review proceedings.”
14. In the wake of this prayer I was of the humble view that the question of exemption has to be considered first before the court can consider whether or not to grant leave. This is also certainly consistent with section 9(4) of the *Fair Administrative Action Act* which provides that exemption from exhaustion of internal appellate or review mechanisms may be made only on an application by a party. This subsection is better understood in the context of the entire section 9 and for this reason I reproduce section 9 in its entirety here; it reads as follows:
 9. Procedure for judicial review.
 - (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
 - (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 - (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person



from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
15. Subsection 4 is clear that in exceptional circumstances, and on an application by the applicant, the court may exempt such a party from the requirement to exhaustion other dispute resolution mechanisms before moving the court for judicial review.
 16. If the application for exemption is made, the law does not say that it would be determined ex parte. It is for this reason that I invited the respondents to make their representations on this aspect of the applicant's application before an order on the application for leave is made.
 17. By making the application for exemption, the applicant must, by that very fact, be acknowledging that there are other mechanisms including internal mechanisms for appeal or review and other remedies that it ought to have pursued before seeking to move this Honourable Court for judicial review reliefs.
 18. When I sought know which provision in the law that may have prompted the applicant to seek exemption, Mr. Wakwaya, the learned counsel for the applicant referred me to regulation 48 of the Capital Markets (Coffee Exchange) Regulations, 2020 which provides for appeal to Capital Markets Authority in the event one is dissatisfied with an act or omission of an exchange. That regulation reads as follows:
 48.
 - (1) Any person aggrieved by an act or omission of an exchange may within thirty days after being notified of such act, omission or decision, appeal to the Authority.
 - (2) Where an applicant is dissatisfied with the decision of the Authority in sub regulation (1), the applicant may seek judicial recourse within thirty days of the decision.
 19. According to Mr. Wakwaya, neither the Act nor the regulations prescribe the "judicial recourse" a dissatisfied applicant may take against the decision of the authority and it is for this reason that he opted for the path of judicial review if exemption is granted.
 20. Contrary to Mr. Wakwaya's submission, section 35 (1) of the *Capital Markets Act* cap. 485A says that a person aggrieved by any direction of the Authority may appeal to the Capital Markets Tribunal. This section reads as follows:
 35. Appeals from action by Authority
 - (1) Any person aggrieved by any direction given by the Authority to such person or by a decision of the Authority or by the Investor Compensation Fund Board—
 - (a) refusing to grant a licence;
 - (b) imposing limitations or restrictions on a licence;
 - (c) suspending or revoking a licence;
 - (cc) refusing to approve a public offer of securities;
 - (d) refusing to admit a security to the official list of a securities exchange;
 - (e) suspending trading of a security on a securities exchange; or



- (f) requiring the removal of a security from the official list of a securities exchange;
- (g) refusing to grant compensation to an investor who has suffered pecuniary loss resulting from failure of a licensed stockbroker or dealer, to meet his contractual obligations or pay unclaimed dividends to a beneficiary who resurfaces, may appeal to the Capital Markets Tribunal against such directions, refusal, limitations or restrictions, cancellations, suspension or removal, as the case may be, within fifteen days from the date on which the decision was communicated to such person. (Emphasis added).

21. The first tier of appeal is to the Authority. The second tier of appeal is to the Capital Markets Tribunal. The jurisdiction of this Honourable Court is invoked in the third tier of appeal. Section 35A (22) is to the effect that it is the appellate jurisdiction and not the judicial review jurisdiction that is invoked. This provision of the law reads as follows:

(22) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court. (Emphasis added).

22. It follows that even if the applicant had appealed to the Authority and to the Capital Markets Tribunal, it could only invoke the appellate jurisdiction of this court if dissatisfied with the decision of the Tribunal. Judicial review would not be available to it and, that being the case, an application under section 9(4) of the *Fair Administrative Action Act* for exemption from exhaustion of the internal dispute resolution mechanisms would be of no consequence. It would be of no consequence because the presumption is such that an application can only be made by a party would otherwise be entitled to file an application for judicial review and not an appeal.

23. There is no dispute that judicial review is not an appeal and a judicial review court cannot assume appellate jurisdiction in a judicial review application. One of the hallmarks of appellate jurisdiction, for instance, is that the appellate court is entitled to substitute its own decision for that of the subordinate court or tribunal. Not so for judicial review where the court would be concerned more about the process rather than the merits of the decision.

24. It is not part of the purpose for judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question (see Lord Hailsham in *Chief Constable of the North Wales Police versus Evans* (1982) 1 WLR 1155 at 1160F).

25. It has also been held in *R versus Entry Clearance Officer, Bombay ex p Amin* (1983) 818 at 829 (B-C) (per Lord Fraser) that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer. However, it has been held in *R versus Inland Revenue Commissioners, ex p Preston* (1985) AC 835 that:

“A remedy by way of judicial review is not to be made available where an alternative remedy exists...judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision...” (Emphasis added).



26. Addressing the same issue in R versus Peterkin, ex p Soni (1972) Imm AR 253 Lord Widgery CJ had this to say:

“Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere.” (Emphasis added).

27. It follows that under no circumstances would leave be granted to the applicant because judicial review recourse would not be available to an applicant who is dissatisfied with the decision of the Authority or Capital Markets Tribunal. In the circumstances, the applicant’s application is misconceived and an abuse of the process of this Honourable Court. Leave is denied and the application dismissed. Considering the stage at which the application has been dismissed, I make no orders as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 31 MAY 2024

NGAAH JAIRUS

JUDGE

