



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO 78 OF 2012

REPUBLIC.....APPLICANT

VERSUS

THE MINISTER FOR AGRICULTURE.....1ST RESPONDENT

THE MINISTER FOR FINANCE.....2ND RESPONDENT

HORTICULTURAL CROPS

DEVELOPMENT AUTHORITY.....3RD RESPONDENT

COMMISSIONER OF CUSTOMS

AND EXCISE.....4TH RESPONDENT

THE COMMISSIONER OF POLICE.....5TH RESPONDENT

THE DIRECTOR, CRIMINAL

INVESTIGATIONS DEPARTMENT.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

AND

AFRICHINA INTERNATIONAL

COMPANY (K) LTD.....1ST INTERESTED PARTY

TRIMA TRADING COMPANY LIMITED.....2ND INTERESTED PARTY

TOP NUT COMPANY LIMITED.....3RD INTERESTED PARTY

DAHIRAAN ENTERPRISES.....4TH INTERESTED PARTY

ASIAN STAR.....5TH INTERESTED PARTY

HEXIN KENYA LIMITED.....6TH INTERESTED PARTY

QWEI FOOD PRODUCTS LIMITED.....7TH INTERESTED PARTY

MACADAMIA GROWERS ASSOCIATION.....8TH INTERESTED PARTY

BAKERY CONFECTIONARY, FOOD MANUFACTURING

& ALLIED WORKERS UNION (K).....9TH INTERESTED PARTY

GEOFFREY MUCHIRA KIBATA.....10TH INTERESTED PARTY

***EXPARTE* NUT PROCESSORS ASSOCIATION OF KENYA**

JUDGMENT

This matter revolves around the exportation of macadamia nuts, raw nuts and other nuts-in shell products from Kenya to foreign markets. The *ex-parte* Applicant (Applicant) is a registered society under the Societies Act, Chapter 108 of the Laws of Kenya whose membership is made up of local firms engaged in the business of planting, harvesting, warehousing, transporting, processing, selling and exporting agricultural products including macadamia nuts. Among its members are Kenya Nut Co. Ltd, Wonder Nuts (K) Ltd, Jungle Macs (K) Ltd and Equatorial Nuts (K) Ltd.

The genesis of the present matter is The Agriculture (Prohibition of Exportation of Raw Nuts) Order, 2009 namely Legal Notice No. 109 of 2009 dated 16th June, 2009 through which then Minister of Agriculture made a decision prohibiting the exportation of raw nuts (macadamia, cashew nuts and bixa) from Kenya. Later on, through Gazette Notice No. 16229 published on 17th December 2010, the Minister of Agriculture issued a directive lifting the said ban for six months from 15th December, 2010 to 30th June, 2011.

Thereafter, some of the nut processing companies filed a suit before this court, being **REPUBLIC v MINISTER OF AGRICULTURE & ANOTHER EXPARTE EQUATORIAL NUTS PROCESSORS LIMITED & 3 OTHERS, NAIROBI HIGH COURT JUDICIAL REVIEW MISC. APPLICATION NUMBER 368 OF 2010**, seeking to retain the ban on the exportation of raw nuts. Justice Gacheche in a ruling delivered on 17th December, 2010 granted leave which was also to act as a stay of the ministerial order lifting the ban of the exportation of raw nuts. Equatorial Nuts Processors Limited, Sawa Africa EPZ Limited Kenya, Nut Company and Wonder Nuts (Kenya) Limited were the *ex parte* applicants in the matter filed against the Minister of Agriculture and the Commissioner of Customs & Excise. Some of the interested parties in that matter are also parties in the present suit.

Following the order of stay, the 1st Interested Party herein, Africhina International Company (K) Ltd (AICL) filed an application seeking to set aside the stay orders. However, in her ruling of 22nd June, 2011, Justice Gacheche declined to grant the prayer. AICL again moved the court on 13th July, 2011 seeking amongst other orders that the Commissioner of Customs and Excise do immediately release its containers then held within the Commissioner of Customs and Excise's customs area. The court allowed the application on certain conditions.

The Applicant herein, National Processors Association of Kenya (NPAK) complains that it is privy to information that top government officials in the ministries of Finance, Trade, Agriculture and Industrialization have been holding meetings with a view to granting export licences and/or exemption to the interested parties for the exportation of raw nuts-in-shell, macadamia and other nut products from the country.

NPAK contends that such a move will be a blatant contravention of the orders issued by Honourable Justice Gachehe in the **JUDICIAL REVIEW MISC. APPLICATION NUMBER 368 OF 2010** by which orders the nut products still remain prohibited pending the hearing and determination of the matter before the court.

It is the Applicant's case that the interested parties are not in any way licensed to purchase, process, export and/or in any other manner deal with raw nuts-in-shell and other macadamia nuts products within the meaning of the Horticultural Crops Development Authority Order, 2011. NPAK relies on an Investigation Report prepared by Messrs Tide Management Services Limited in support of its contention that the interested parties have been engaging in illegal smuggling of macadamia nuts and other nut products for export without the requisite export licences in contravention of this court's orders.

NPAK further contends that the interested parties who are not licensed to export macadamia nuts by the 3rd Respondent have been involved in illegal and large scale smuggling of macadamia nuts from Kenya in an unchecked and uncontrolled manner and allegedly in collusion with the officials of the 3rd Respondent. That despite the Court orders being in place staying the Minister's Order, the interested parties who are unlicensed exporters continue to illegally smuggle macadamia nuts out of the country to the detriment of the Applicant. It is NPAK's case that the respondents' actions are contemptuous and illegal and thus warrant this court's intervention through the orders sought.

The Applicant has moved the court through a Notice of Motion dated 30th March, 2012 supported by the affidavit of Charles Muigai, the General Secretary and Chief Executive Officer of the Applicant in which it seeks the following orders:

1. **THAT this Honourable court be pleased to issue AN ORDER OF MANDAMUS compelling the 5th and 6th Respondents herein to forthwith commence investigations into the alleged illegal trade of macadamia nuts by the unlicensed, un-contracted, illegal smugglers, exporters and shippers of macadamia nuts including the 7 interested parties herein and/or its directors and/or agents and to thereafter exercise the power of arrest and/law enforcement and to initiate and undertake criminal prosecutions of the necessary offenses in a Court of law.**
2. **THAT this Honourable court be please to issue AN ORDER OF MANDAMUS directed at the 3rd Respondent herein compelling him to furnish this Honourable Court with a list of all entities licensed and registered to carry out the Macadamia processing and export business within the Republic of Kenya including the relevant data on nut-in-shell stock held by the interested parties and to take all the necessary steps within their power as contained in the Horticultural Development Crop Authority Order of 2011 and other relevant law including the exercise of their power of entry, inspection and seizure with respect to the illegal smuggling business being perpetrated by the Interested Parties herein and to take drastic action for purposes of protecting the Kenya macadamia nut industry, the reputation of the Kenyan nut products in the International market and the Kenyan economy at large.**

3. **THAT this Honourable court be pleased to issue AN ORDER OF MANDAMUS directed at 1st and the 3rd Respondents herein compelling them through its enforcement arm to execute out their regulatory duties and to this end to collect data, maintain a data base and to disseminate information on Macadamia Nuts and related products and to forthwith establish rules and regulations regarding the licensing criteria and procedures which meet International standards.**
4. **THAT this Honourable court be pleased to issue AN ORDER OF PROHIBITION directed at the 2nd Respondent prohibiting him from in any way granting export exemption or in any other manner from permitting the export of Macadamia nuts and related products with respect and/or relating to the activities of the Interested Parties herein as far as the same relate to macadamia Nuts and other nuts products.**
5. **THAT this Honourable court be pleased to grant A DECLARATION condemning the Respondents herein to forthwith compensate the Applicants herein and their members for the losses incurred including but not limited to; loss of revenue, idle capacity, loss of employment and costs and expenses incurred in training new employees, salaries, loss of profit, premature harvesting, rent and related expenses arising out of illegal smuggling of macadamia nuts to the tune of Kshs. 5 billion.**
6. **THAT the cost of this Application be provided for.**

The respondents opposed the application. The 3rd Respondent, Horticultural Crops Development Authority (HCDA) filed a replying affidavit sworn by Dr. Alfred K. Serem, its Managing Director dated 9th May, 2012 and also filed written submissions on 3rd October, 2013 in which it basically denied the Applicant's averments. HCDA contends that there is no evidence that it (HCDA) had granted any exemption to the interested parties. It is its case that if the prayers sought are granted, it will scuttle the process and growth of the economy and will be tantamount to closing doors to new industries and innovators. It is HCDA's further contention that the Gazette Notice No. 109 of 16th June 2009 was not meant to last forever but was a temporary measure whose purpose had lapsed as a result of passage of time. HCDA also dismissed the report by Tide Management Services relied on by the Applicant stating that it bears unsubstantiated rumours and suspicions which cannot be relied on.

The 4th Respondent, the Kenya Revenue Authority (KRA) also opposed the application. Its case is found in the affidavit of Seraphine Anamanjia of 30th April, 2012 and written submissions filed on the 10th October, 2012. KRA denies that any macadamia nuts are being exported with its consent and states that Legal Notice No. 109 is in force and it is under a duty to enforce it. KRA stated that in the discharge of its duty, it is guided by the provisions of the East Africa Community Customs Management Act (EACCMA), Legal Notice No. 16229 of 15th December, 2010 and the order of this Court of 17th December, 2010 and that it continues to be non-partisan in its functions, giving fair treatment to all traders.

The 1st, 2nd, 5th, 6th and 7th respondents urged that the application be dismissed. Through their counsel Mr. Kiage, it was submitted that the orders sought could not issue as the application sought permanent injunction. The respondents asserted that an Order of Prohibition can only issue stopping a particular action which is not the case in the present application.

The 8th, 10th and 11th interested parties were in support of the Applicant's case. Mr Mwangi arguing the case for the 10th Interested Party has urged that leaving the industry unregulated will expose him to loss. He urges that unless his rights are protected by way of regulation of the industry, then he will not

have a market where he can market and sell the nuts and will be cut off from the chain. He also submits that if the nuts are harvested prematurely, then the consumers' rights will be violated and the court has the duty to protect the rights of consumers. Mr Mwangi further emphasized that the orders sought are not open-ended and that the client was just seeking enforcement of the Legal Notice and the order of Justice Gacheche.

Mr Ngechu representing the 11th Interested Party stated that the orders sought were to the advantage of macadamia growers. The 7th Interested Party took the respondents' position in opposing the application though during the hearing on 11th June 2013, Mr Nyaberi sought to support the application.

I will start by addressing the nature of the existing suit and its implications if any on the present matter. The suit in question is **JUDICIAL REVIEW MISC. APPLICATION NUMBER 368 OF 2010**, in which the four applicants mentioned earlier in this judgment and who are also processors and exporters of macadamia nuts sued the Commissioner of Customs & Excise and the Minister of Agriculture. The Notice of Motion dated 22nd December 2010 sought, among other orders, an order:-

“That this Honourable Court be pleased to issue an order of Certiorari to remove and bring to court and quash the proceedings, record and decision(s) of the 1st respondent made on 15th December 2010, or thereabout that lifts the ban on the export of raw nuts (nuts in shell) and described as of the following varieties: macadamia nut (macadamia SPB) cashew nut (Anarcadium Occidentale) Pistachio nut (Pistachio vera) and Oyester nut (Tarfaira Pedata) and the said to start on 15th December, 2010 to 30th June 2011. And/or any such decision, order proceedings and/or Gazette Notice of the said effect, intended to be published and/or now being published with these proceedings.”

The Motion also sought an Order of Prohibition to prohibit the 1st Respondent from lifting the ban, and also an order of mandamus directing the respondents to take all steps necessary to enforce the ban/prohibition of the marketing and export of raw nuts from Kenya. The grounds relied on are similar to those in the present application.

I take notice of the fact that on 5th July this year, my learned brother Justice G.V. Odunga determined that matter and dismissed the Notice of Motion. It is no doubt that the germane of the now concluded application and the present matter are identical and that some of the parties in the present matter were also parties in that application. The present application cannot succeed for several reasons. First is the issue of *res judicata*.

The doctrine of *res judicata* is couched in Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya in the following words:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The Court (Majanja, J) in the case of **EDWIN THUO V ATTORNEY GENERAL & ANOTHER NAIROBI HIGH COURT PETITION NO. 212 OF 2012**, observed as follows with regard to the doctrine of *res judicata*:-

“The courts must always be vigilant to guard against litigants evading the doctrine of *res*

judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, ‘*parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.*’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)* where he stated, ‘*If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata*’ “

My finding therefore, is that this matter has been dealt with by a competent court of concurrent jurisdiction and this court is in this respect divested of the jurisdiction to deal with the matter again. The application raises the same issues as those in the decided case and even though instituted by different parties, it is clear that the parties in the disposed case are also parties in this matter. This Court is thereby barred by the doctrine of *res judicata* from entertaining this matter afresh. On the same note, I must mention that even if the other matter had not been concluded, the institution of a parallel suit seeking to enforce compliance with orders issued in another suit and which also sought orders similar to the present suit is in the very least an abuse of the court process. The institution of several suits over the same issues and in respect of the same parties or parties litigating through their proxies is a matter that should be discouraged.

The second issue is that of the efficacy of the prayers sought. It is clear that the impugned Gazette Notice had the effect of lifting the ban for a period of six months with effect from 15th December, 2010. The period of that order has since lapsed and consequently, the court orders of stay issued by Justice Gacheche have also overtaken by events. In fact the stay order issued by Justice Gacheche automatically lapsed when Justice G. V. Odunga dismissed the substantive Notice of Motion in that particular case. In this regard, I agree with the finding of my brother G.V. Odunga J where in disallowing the Notice of Motion, he observed:-

“25. What is clear is however, that the lifespan of the said Gazette Notice was between 15th December 2010 and 30th June 2011 (now past). The said Gazette Notice has to all intents and purposes run its course and is no longer effective. Pursuant to the orders of stay granted herein it never saw the light of the day until it died a natural death. The prayer seeking the quashing of any orders which are yet to be made cannot be granted in the manner in which they are sought since the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”

I agree with his reasoning on the fate of the ministerial order lifting the ban, on the export of macadamia nuts and nuts of the same genre, for a period of six months.

I also note in passing that there is now new legislation in place to take care of the Applicant's complaints. The Agriculture, Fisheries and Food Authority Act (Act No. 13 of 2013) (the Act) which came into operation on 25th January, 2013 and whose Section 45 repealed the Agriculture Act, Cap 318, Laws of Kenya under which the ban order was made provides at Section 43 that: **“A person shall not export raw cashew nuts, raw pyrethrum, raw bixa or raw macadamia except with written authority of the Cabinet Secretary issued with the approval of the National Assembly.”** This provision obviously

override the earlier orders issued by the Ministry and litigation over the ban order amounts to flogging a dead horse.

The question that remains is whether the orders sought by the Applicant ought to be granted. I have already observed that the alleged breach of earlier court orders that stayed the temporary lift of the ban by the Minister of Agriculture ought to have been pursued in the same matter and the move by the Applicant to allege breach through a fresh suit is an abuse of court process and duplication of judicial effort. More importantly, the impugned Legal Notice has since been overtaken by events following its expiry as it was to last for six months. Furthermore, the original Notice banning the exportation has since been repealed through new legislation, which in its substantive provisions, now expressly bans exportation of the raw nuts. To a large extent therefore, and in as far as the prayers sought by the Applicant are hinged on the enforcement of a Legal Notice which has since then been repealed with the advent of the new law, issuance of orders will amount to nothing. Their issuance would in fact act to jeopardize the implementation of the current law which bans exportation of raw nuts, except with the permission of the Cabinet secretary and with approval of Parliament. I adopt the findings of Odunga, J in **JR MISC. APPLICATION NO. 368 OF 2010** where the learned Judge went on to conclude that:-

“[26] ...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and hence the Court will refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See Anthony John Dickson & Others vs. Municipal Council of Mombasa, Mombasa HCMA No. 96 of 2000.”

The Applicant and some of the interested parties that were in support of the Applicant's case complain of the respondents' laxity in enforcement of the export ban. It relies on Messrs Tide Management Services Limited's Report to prove that there has been smuggling of nuts from the country by some of the interested parties with full knowledge of the respondents. This ground is weak. First, if there is a breach of the law by any person including the interested parties, it is upon the Applicant as a complainant to report that matter to the relevant authorities. Moreover, the court cannot cause enforcement of the ban based on a generalised report and without specific facts and incidences being tendered before the court to clearly show that the respondents' actions and/or inactions are such that they attract specific grounds of judicial review, such as abuse of power, *ultra vires*, unreasonableness etc. Allegations pointing to commission of crimes must be supported by evidence. Indeed, the respondents have a duty of ensuring that the law is complied with. They can only be said to have failed in their duties where specific reports have been made to them and no steps have been taken to investigate those reports.

Indeed in the case before this court, the Applicant has stated that there was one incident where a complaint was made to the police and the police did indeed make investigations and had suspects charged and convicted. The Applicant's complaint as per the verifying affidavit is:-

“26. THAT upon the complaint of the 3rd Respondent herein, the CID undertook flimsy and shoddy investigations into the matter and made an easy case where the person was charged and released on a fine of Kshs. 5,000.00.

27. THAT in our opinion the Criminal Investigation authorities ought to have conducted their independent investigations to ascertain the true owners of the said containers.”

Those two paragraphs are very telling. In the first place they demonstrate that the 3rd, 5th and 6th respondents have performed their duties in an attempt to stop the smuggling of nuts out of the country. Secondly, they show that the Applicant is not satisfied with the services of the said respondents. The two paragraphs support the respondents' position that they have executed their mandate. They cannot be faulted for failing to carry out their duties since they have done what the law requires of them. This court has no mechanism for finding out whether the investigations were shoddy. The court would be exceeding its mandate were it to concur with the Applicant that the investigations were poor. Investigation of crimes and prosecution of the same are matters that squarely fall into the 5th and 6th respondents' arena and this court would be exceeding its jurisdiction were it to direct them to conduct investigations in a certain manner. It is noted that the said investigations and prosecution resulted in a conviction and the imposition of a fine.

Related to the above, is the fact that this court sitting in judicial review looks at the process and not the merits of the impugned decision. As, was observed in **REPUBLIC V COMMISSIONER OF CUSTOMS SERVICES EX PARTE AFRICA K-LINK INTERNATIONAL LIMITED, JUDICIAL REVIEW NO. 157 OF 2012:**

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent.”

Thus, it is not for this court to decide whether there should be a ban or not on the exportation of raw nuts. The court cannot even stipulate a mechanism on the best way to implement the ban policy. The court cannot interrogate the viability or otherwise of the said policy for that responsibility lies with those mandated by the law to make the policy. The Applicant's submissions about the negative effects the lifting of the export ban would have on the industry are issues of policy that courts are not best placed to deal with in the absence of demonstrated flaw in the making or implementation process, as to warrant intervention by this court.

For the reasons stated above, I decline to grant the prayers sought and the Notice of Motion dated 17th April 2012 fails and is hereby dismissed. I make no order as to costs.

Dated, delivered and signed at Nairobi this 4th day of October, 2013.

W. K. KORIR,

JUDGE



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