**Njuguna v Minister for Agriculture**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 5 January 2000

**Case Number:** 144/00

**Before:** Omolo, Shah and O’Kubasu JJA

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**Summarised by:** W Amoko

*[1] Judicial review – Application for leave to institute judicial review proceedings – Jurisdiction of the*

*Court – Test for whether leave to institute proceedings should be granted.*

**JUDGMENT**

**OMOLO, SHAH and O’KUBASU JJA:** On 12 June 2000, the seven Appellants now before us, applied for leave for issuance of an order of *certiorari* to remove into the High Court and quash in their entirety the following: “1. Firstly the Tea (Election) Regulations, 2000 made by the Minister for Agriculture (‘the Minister’) purportedly in exercise of his powers under section (*sic*) 3, 4 and 5 of The Tea Act (Chapter 343, Laws of Kenya); 2. S econdly ‘The Tea Elections Programme’ promulgated spelt out and/or pronounced vide the Minister’s press statement dated 18 May 2000 insofar as the said statement its policy contents and/or purport is to decree/direct that the elections affecting the running and management of Tea Factories constituted incorporated registered under the Companies Act (Chapter 486, Laws of Kenya) do commence and/or be held by 19 June 2000 and/or any other date or at all”. The Appellants also applied for leave for issuance of: “Prohibition prohibiting the Minister from implementing the policy order/decree called ‘The Tea Elections Programme’ promulgated spelt out at and/or pronounced vide the said statement insofar as the same is to decree/direct and/or call elections affecting the running and management of Tea Factories constituted and incorporated and registered as limited liability companies under the said Companies Act to commence and/or be held on 19 June, 2000 and/or any other date or at all”. The Appellants also sought orders to the effect that the leave so sought do operate as a stay of “The Tea (Elections) Regulations” and “The Tea Elections Programme”. The said application came up for hearing before the superior court (Githinji J) on 13 June 2000 when it was argued by Mr Muturi *Kigano* for the Applicants. On 14 June 2000 the Learned Judge declined to grant the application and dismissed the same. It is against that dismissal by the Learned Judge that the Appellants have appealed to this Court. Grounds one, two and three in the memorandum of appeal were argued together by Mr *Kigano* whereas grounds four and five were argued together. The said grounds are: “The Learned Judge erred in law in: 1. F ailing to appreciate that the Minister’s (Respondent’s) delegated power/authority to make subsidiary Rules under the Tea Act is not unlimited: is amenable to censure by way of Judicial Review at all times to ensure that the same (Rules) are in accord with the policy objective and aspirations of the said Act; 2. H olding that promulgation of the impugned Rules by the Minister was sacrosanct jurisdiction and/or that ‘The High Court has no jurisdiction to quash a legislation however unpopular it may be’. 3. P rematurely and peremptorily (at leave stage) holding that the Superior Court lacked judicial power and/or authority whatsoever to grant *Certiorari* to quash delegated legislation. 4. D erogating from his judicial duty and/or discretion at leave stage: that his role then was to appraise whether an arguable case had been made prima facie as evinced by the Statement. 5. F ailing to appreciate that the application raised triable issues necessitating the grant of the orders sought”. Mr *Kigano*’s main complaint was based on ground four of the above-mentioned grounds of appeal. The Learned Judge, Mr *Kigano* argued, abdicated his role at the leave application stage, that is to say, instead of ruling on whether there was a *prima facie* case to go for full arguments later, the Learned Judge ruled that subsidiary legislation could not be challenged in a court of law. The Learned Judge ruled that subsidiary legislation enjoys the status of written law and that a court has no jurisdiction to quash subsidiary legislation however unpopular it may be. The Judge went on further to say that even assuming that the grounds in support of the application were valid, that is that even if the Tea (Election) Regulations 2000 were *ultra vires* their parent Act (The Tea Act, Chapter 343), the Court could not have power, on an application for an order of *certiorari*, to quash the said Regulations. With respect, the Learned Judge erred. He ruled on the merits of the application yet to come (after leave was granted). It cannot be denied that leave should be granted, if on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. 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. See *Halsbury’s Laws of England* (4 Ed) Volume 1(1) paragraph 167 at page 276. One of the issues taken up by Mr *Kigano* was that there was nothing in the Tea Act to enable the Minister to order election of office-bearers of an individual tea factory run by a private limited company. That certainly is an arguable point. Another point was that the Minister was not empowered to order or manage or regulate elections to be conducted by tea factories. We need not go into all issues or even all the grounds of appeal as we would then be trespassing on the jurisdiction of the court which may eventually hear the application brought under Order 53, Rule 3 of the Civil Procedure Rules. Mrs *Kimani* who appeared for the Minister conceded, and in our view quite rightly so, that the Learned Judge went beyond the ambit of his jurisdiction by ruling on substantive issues. We are satisfied that the Learned Judge ought to have granted leave to the Appellants for lodging the application for *certiorari* and prohibition. As he did not do so it is within our jurisdiction to grant such leave. The order that we make is that we set aside the order of the Learned Judge dismissing the Appellants’ application for leave to apply and substitute it with an order granting leave as prayed for in the chamber summons dated 9 June 2000. We cannot make an order that the grant of such leave do operate as stay of the implementation of the said Regulations or the said Programme. This is because, we are informed, the elections have already taken place and the issue of stay has been overtaken by events. We therefore allow this appeal to the extent already stated. The Appellants will have the costs of this appeal. For the Applicants: *C M Kigano* instructed by *Kigano and Assoc*

For the Respondent:

*M Kimani* instructed by the *Attorney-General*