**Re Bivac International SA (Bureau Veritas)**

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

**Date of judgment:** 29 November 2005

**Case Number:** 1541/05

**Before:** Nyamu J

**Sourced by:** LawAfrica

*[1] Judicial review – Application for leave to commence proceedings – Whether leave to operate as stay*

*– Applicable principles.*

**Editor’s Summary**

By application dated 25 October 2005, the applicant sought leave to apply for an order of *certiorari*, to move into the court and quash the contracts between Kenya Bureau of Standards and SGS on the one hand and Intertech International Limited on the other, for the provision of pre-shipment verification of conformity to standards, dated 14 September 2005, among other orders. The applicant also sought orders that the leave so granted does operate as stay of implementation of the contracts in question and of any operations thereunder, pending the hearing and determination of the judicial review proceedings.

**Held** – An application for leave to commence proceedings in the nature of judicial review does restrict the court to threshold issues, namely whether the applicant has an arguable case and whether, if leave is granted, the same should operate as a stay. Judicial review remedies are discretionary and that discretion is a judicial discretion and, therefore, the court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the court’s discretion and also so that in case of an appeal, the appellate court is able to ascertain how and why the court’s discretion was exercised in the manner or way it was exercised. An arguable case is not ascertained by the court tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise. One has to consider, without making any findings, the scope of the judicial review remedy sought, the grounds and possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him. Like the Biblical mustard seed, which a man took and sowed in his field and which is the smallest of all seeds but when it grew it became the biggest shrub of all and became a tree so that birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. The court can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration, namely; the speed of decision particularly in the financial field; a proper consideration of the public interest; a proper consideration of the legitimate interest; decisiveness and finality unless there are compelling reasons to the contrary.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*R v Judicial Service Commission of Kenya* ex parte *Stephen Pareno* High Court miscellaneous number

1025 of 2003

***United Kingdom***

*John v Rees* [1970] Ch 345

*R v Monopolies and Mergers Commission* ex parte *Argyll Group PLC* [1986] 1 WLR 763