



REPUBLIC OF KENYA



Department of Agriculture & Food Authority v George & 4 others (Miscellaneous Civil Application 15 of 2021) [2023] KEHC 19478 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 19478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 15 OF 2021**

RPV WENDOH, J

APRIL 27, 2023

IN THE MATTER OF THE AGRICULTURE AND FOOD AUTHORITY

BETWEEN

THE DEPARTMENT OF AGRICULTURE & FOOD AUTHORITY APPLICANT

AND

EMMANUEL N. NYAIRARIA 1ST RESPONDENT
VICTOR MUKAMI GEORGE 2ND RESPONDENT
PETER MBERO 3RD RESPONDENT
JACKSON ROBI 4TH RESPONDENT
SEMPRIN AWAMBUA MAMBE 5TH RESPONDENT

RULING

1. This ruling is in respect to the applicant's application dated 11/6/2021. The applicant seeks the following orders: -
 - a. Spent;
 - b. That the 1,237 bags of maize delivered by the Agriculture and Food Authority to National Cereals and Produce (NCPB) Kehancha Depot be destroyed by way of burning and/or any other means deemed appropriate and/or in accordance with National Environmental Management Authority (NEMA) guidelines and regulations within 14 days from the date of this order;
 - c. That the destruction exercise be supervised by the Officer Commanding Station Migori Police Station, the Authority, NEMA, NCPB, Migori County Public Health Officer and/or any other relevant Government Department;



- d. Costs of this application be in the cause.
2. The application is based on the grounds on its face and is supported by the affidavit of Oscar Kasingo an employee of the applicant working as a Senior Technical Officer (Regulation and Compliance). It was deposed that the applicant is mandated under the Crops Act and its Regulation to ensure that all Food and Crops produce in Kenya meet the safety and quality assurance standards fit for human consumption; that on 22/4/2021 he received instructions from the applicant's Director, one Ms. Beatrice Nyamwamu to the effect that the Migori County Commissioner's Office had in the course of their routine surveillance learnt that some traders at Gukipimo Trading Centre (trading center) in Isebania - Migori County were aggregating and collating maize; that the applicant's Director had commissioned a team to the trading center the following day to check on the maize for the purposes of checking whether it complied with the safety assurance and quality standards as required by the Act and its Regulations; that on 23/4/2021, the commissioned team travelled to the trading center and took samples of the seized maize for purposes of testing the same for aflatoxins levels.
 3. Further, it was stated that when the exercise took place between 23rd to 26th April, 2021, the maize samples were taken for testing and it was found to be toxic, hazardous and/or unfit for human consumption and ought to be destroyed immediately; that when executing the seizure, all the consignees and/or owners of the 1,237 bags confirmed and/or consented to the maize being destroyed or otherwise pursuant to Section 30 (7) of the Food, Drugs and Chemical Substances Act; that although the Crops Act and its Regulations gives the applicant the power to seize and detain any maize, neither the Act nor its Regulations gives the applicant the authority to destroy such maize once it is established that it is unfit for human consumption.
 4. The applicant deposed that as from 12/6/2021, the National Cereals Produce Board Kehancha Depot (NCPB Kehancha Depot) will incur expenses related to storage fee of the maize and fumigation in order to prevent contamination of other clean maize; that in order to avert the further escalation of the said costs, the orders sought should be granted. The applicant urged this court to allow the application as prayed.
 5. The application was opposed. Semprina Wambua Mambe and Victor Mukami George filed their respective replying and further affidavits both dated 7/7/2021. Semprina deposed that the order sought in the application are not legal/equitable as they are premised on falsehood and concealment of material facts; that during the seizure, sampling and testing of the maize, the respondents never participated, they were not represented by the experts of their choice and/or Advocates neither were they present during the actual testing, analysis and sampling as required by law; that before any administrative action is taken by any person, institution or authority which decision will likely affect the rights and interest whether personal or proprietary rights, such action must be fair, constitutional and legal; that the maize seized were sourced from the farms and had not been imported from the Republic of Tanzania or elsewhere and never contained aflatoxins as alleged; that the respondents have been in the cereals business and they have complied with the health standards as provided and contained in the Agricultural and Food Authority Act.
 6. Further, it was deposed that the intention of the Authority was to mint money from poor citizens; that out of the bags seized, a total of 150 bags were released to her and therefore it beats logic if they contained aflatoxins why the same were released to her; that the information they have, is that the purported maize stored at NCPB Kehancha Depot is no longer there as it has been shared out and/or sold and the proceeds shared by the applicants; that the maize seized was 2,029 but not 1,237 as alleged by the applicant; that when the alleged seizure happened on 13/6/2021, she was hospitalized and therefore she would not have signed the seizure forms on 23/6/2021.



7. In the further affidavit, Victor Mukami deposed that on 13/6/2021, when the raid took place, the applicant together with its officers were violent, shot him on the elbow and he was hospitalized; that the 23/6/2021 he was still hospitalized when they took away 365 bags and therefore he never executed any seizure forms as purported; that the actions of the applicant to raid the store in his absence was a violation of his constitutional rights and failure to disclose the actual number of bags seized, is a ploy to steal from him and share the proceeds realized. The respondent urged this court to disallow the application and order the return of the seized maize.
8. Parties filed their respective submissions. The applicant submitted on four issues. On whether the maize seized is contaminated and should be destroyed, it was submitted that upon analyzing the maize samples it was found that the 1,237 bags of maize contained more than 10 parts per billion of aflatoxin levels; that pursuant to Section 29 (1) (d) of the *Crops Act*, the inspector has the power of entry and seizure of any article or thing which the inspector has reasonable grounds to believing that an offence under this Act has been committed. The applicant further relied on the provisions of Regulations 17 (6) & (7), 27 (1); that Section 38 (a) & (d) of the *Crops Act* provides that a petition must be made to the High Court for declaration that this Act has been violated. The applicant urged the court to consider the findings in *Pan Africa Commodities Limited vs Freight Forwarders Kenya Limited & Another (2015)* eKLR where the court was called upon to determine whether the Russian wheat was fit for consumption and submitted that the report confirmed that the 1,237 bags of the seized maize were contaminated and therefore it is only fair and just that the court orders for immediate destruction of all the impugned maize.
9. On whether the respondents proved their allegations as required by law, it was submitted that the on 18/8/2021, the applicant wrote to the NCPB Kehancha Depot to confirm whether the maize is still in their store; that on 8/9/2021, the NCPB Kehancha Depot confirmed that the maize is still in their custody; that the applicant has succeeded in discharging the evidential burden that shifted to them on the allegations that the maize is no longer stored at the NCPB Kehancha Depot.
10. On whether the respondents should bear the accrued storage charges imposed by the NCPB Kehancha Depot, it was submitted that the applicant proved upon seizure of the 1,237 bags of maize it stored them at the NCPB Kehancha Depot; that the NCPB Kehancha Depot imposes monthly charges upon it and it shall continue doing so until this court determined how the said maize shall be destroyed. The applicant further asked the court to consider the provisions of Regulation 13 (5) & (7) (b) on the storage charges.
11. On who should bear the costs of these proceedings, it was submitted that costs follow the events and are awarded to the winning party.
12. The respondents submitted that the orders being sought are draconian and would be a travesty of justice if granted on the strength of a mere miscellaneous application without a substantive suit or petition; that in the case of *Pan African Commodities Limited (supra)* the expert witness testified about the Russian wheat whose contents were found to be above 20PPB; that there is no evidence placed before this court either orally or through an affidavit by the agent who sampled the confiscated maize.
13. It was further submitted that the report with the sampled cereals which found that the aflatoxins levels was higher than the recommended 10 PPB, does not have such results and its author has not been called to court to give such evidence. The respondents submitted that proceedings for and on behalf of the Government of Kenya are commenced courtesy of the Government of Kenya and the office authorized to sue on behalf of the Government is the Office of the Attorney General unless the authority is suing as a parastatal; that in this instance, the body describing itself as Department of Agriculture is an institution or department under the Ministry of Agriculture and such lacks locus standi to institute



a suit or proceedings on its own unless through the Attorney General; that what is described herein is not the Agricultural and Food Authority and the applicant is not known to anybody other than to itself; that since the Attorney General has not instituted these proceedings, therefore the proceedings are highly defective and an abuse of the court process.

14. The respondent questioned what happened to the extra 792 bags since the respondents stated that a total of 2,029 bags were seized instead of 1,237 bags; that the respondents were not represented by experts of their choice during the sampling exercise and the whole process was carried out in contravention to the rules of natural justice. It was further submitted that there is doubt whether the maize is in existence or has been sold out and therefore orders cannot be issued in vain. The respondents urged this court to dismiss the application with costs.
15. I have considered Notice of Motion, the responses and the submissions of both parties. In light of the foregoing, the issue for determination is whether the orders sought by the applicant can be granted.
16. The matter before this court is based on the provisions under the Crops Act, Section 29 (1) (d) of the Crops Act which gives an inspector powers to enter upon any land, premises or vehicle as he considers necessary, to seize and remove any article or thing where he has reasonable grounds to believe that an offence under this Act is being committed. Upon seizure of the offending goods, the inspector is required to determine first if the food crop is contaminated.
17. The applicant referred to Regulation 17 (6) & (7) of the Crop (Food Crop) Regulations, 2019 but it is Regulation 19 (6) & (7) which provides: -

“The Authority shall, in undertaking routine sampling and testing of food crops and food produce of any dealer, determine if the food crop or food produce is contaminated as a result of being grown in a contamination site.

Where, pursuant to sub regulation (6), it is determined that a food crop or food produce is contaminated, the Authority shall seize and detain the contaminated produce at the cost of the dealer.”
21. Section 38 of the Crops Act provides: -

“Any person who has reason to believe that the provisions of this Act have been, are being, or are about to be violated, may petition the High Court for-

 - (a) a declaration that the provisions of this Act are being, have been, are about to be contravened;
 - (b) an injunction restraining any specified person from carrying out the contravention;
 - (c) a writ of mandamus against an officer or a person which has failed to perform a duty imposed by or under this Act; or
 - (d) any other lawful remedy.”
22. Where a person is of the view that there are violations of any provisions of the law under the Crops Act, they are required to petition the High Court for issuance of necessary orders as the court may deem fit.
23. On whether final orders can be obtained in a miscellaneous application, Order 3 Rule 1 of the *Civil Procedure Rules* provides that every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed. The applicant commenced these proceedings vide a miscellaneous



application. A perusal of the orders being sought shows that they are final in nature. If the court is to grant the orders as prayed, it would effectively dispose of the substance of the matter at question in an interlocutory stage.

24. In the case of *Witmore Investment Limited vs County Government of Kirinyaga & 3 Others (2016)* eKLR the court stated: -

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

25. Similarly, in the case of *Nairobi West Hospital Limited V Joseph Kariba & Another (2018)* eKLR it was held: -

“...In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral sclorsis and still admitted in the Intensive Care Unit of the applicant’s hospital is strenuously opposed...Consequently, the preliminary objection is upheld and this suit is ordered struck out.”

26. The position taken by courts is that substantive orders cannot be issued in miscellaneous applications. I am persuaded by the findings of the courts of concurrent jurisdiction. The orders being sought in the instant application, cannot be granted for the reasons that they are final and may dispose of the suit without the parties being heard. In any event, Section 38 of the *Crops Act* (supra) provides for a petition being filed but not a miscellaneous application. The orders sought cannot be granted and the application is hereby struck out.

27. Be that as it may, the findings on the outcome of the SGS report on the amount of the aflatoxins levels on the seized maize cannot be ignored. The issue herein transcends beyond the allegations of whether the maize contains aflatoxins or not, to the health and safety of the general public.

28. I have perused the annexures produced by the applicant. The various analysis reports “OK-4” show that the levels of the aflatoxins are beyond the maximum of 10 PPB. On the number of bags seized, the total number of maize bags indicated in the seizure forms “OK-3” is 1,237 bags and not the 2,029 bags as alleged by the respondents. The applicant has maintained all through that the seized maize bags are being held at the NCPB Kehancha Depot storage facility.

29. In light of the above, it is in the best interest of all the parties herein that before any action is taken, all the concerned parties should be present when the samples are being taken for testing. The respondents are at liberty if need be, to also seek an alternative authorized expert to test the samples and give an independent report on the levels of aflatoxins on the samples taken from the seized bags of maize. Depending on the outcome of the results, either party may move the court appropriately for issuance of orders.

30. Accordingly, the following orders do issue: -



- i. The application dated 11/6/2021 is incompetent and it is hereby struck out with costs to the Respondents.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 27TH DAY OF APRIL, 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

No appearance for the Applicant.

Mr. Mudeyi for the Respondents.

Ms. Nyauke Court Assistant.

