REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION NO 5 OF 2019

IN THE MATTER OF AN APPLICATION BY EQUATOR BOTTLERS LIMITED FOR

JUDICIAL REVIEW PROCEEDINGS FOR CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 3, 4, 6, 7, 10(1), 11 AND 12 OF THE

FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

AND

IN THE MATTER OF ARTICLES 10, 22, 23 (3) (f), 47, 48, 50 AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

EQUATOR BOTTLERS LIMITED.....APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT AT KISUMU.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

RULING

INTRODUCTION

1. In its Notice of Motion dated 18th December 2019 and filed on 19th December 2019, the Applicant sought an order of certiorari to move this honourable court to quash the letter by the Respondent dated 13th March, 2019 authorising seizure of its product from the market. Leave to apply for an order for Certiorari was given by Cherere J on 11th December 2019.

2. The said application was grounded upon the matters set out in the Statutory Statement dated 5th April 2019 and filed on 8th April 2019. It was supported by the Verifying Affidavit that was sworn by its Manufacturing Manager, Kevin Akoko, on 8th April 2019.

3. The Applicant averred that it instituted proceedings to challenge the 1st Respondent's decision to seize its products without reason, due process of the law and/or justification, from the market vide a letter dated 13th March 2019. It added that on the same date, it wrote a letter to the 1st Respondent requesting it not to seize the whole batch of products in the market but only to seize affected samples, if at all any, there were and to allow due process of investigations to commence.

4. It pointed out that its assertion was supported by the 1st Respondent's County Public Health Officer's internal correspondence that was addressed to the 1st Respondent's Director Public Health Officer's advising that due diligence should be exercised and action narrowed down to only allegedly affected batch to avoid disruption in the market.

5. It stated that its request was not acceded to and the 1st Respondent started seizing its products from the market without notice, explanation and or justification. It termed the 1st Respondent's actions to have been excessive and unreasonable in the circumstances and violated the Constitution of Kenya and the Fair Administrative Action Act. It added that the investigations, if any, that were carried out by the 1st Respondent failed to comply with the written provisions of the law and was grossly un-procedural as that it was never summoned for any proceedings regarding contaminated product.

6. It pointed out that it was served with Summons dated 21st March 2019 in which its Managing Director was charged under Section 36(1) of the Food, Drinks and Chemical Substances Act Cap 245 (Laws of Kenya). It was its contention that no reasons, particulars or offences allegedly committed were disclosed in the Summons and that the Respondents chose to read Section 34 of the said Act in isolation and only to its benefit. In this regard, it sought to challenge the 2nd Respondent's decision to summon it to court without a proper charge.

7. It asserted that the Summons were only intended to malign, intimidate it and extort it. It was apprehensive that the unlawful actions would not only cause it irreversible and considerable financial loss but it would also cause it substantial loss, injury to its reputation and trust. It was thus its averment that the interests of justice would be best served by the decision being quashed.

8. In opposition to the said application, the 1st Respondent's Director of Public Health, Osbon Odero, swore a Replying Affidavit on 28th January 2020 on behalf of the 1st Respondent herein. It was filed on even date.

9. It contended that the orders that had been sought by the Applicant were not tenable in logic and/or in law as the Applicant had admitted in the Verifying Affidavit of Kevin Akoko that some of its samples were affected and to which, it authorised their seizure. It questioned what would happen to the affected samples if the order for *certiorari* was granted and also if such an order would protect the entire public from the unscrupulous practices of the Applicant who release substandard products to the market and ran to court to obtain orders to restrain it from discharging its mandate to protect the public from health hazards it is exposed to due to unscrupulous entrepreneurs like the Applicant herein.

10. It was emphatic that the letter dated 19th February 2019 did not in any way nullify and/or revoke the seizure letter dated 13th March 2019 but only operated as an internal directive from the County Public Health Officer on how best to discharge its mandate and as such, it could not operate as a basis of granting the orders sought.

11. It urged this court to dismiss the Applicant's application with costs for advancing selfish private interests that brazenly disregarded public health interests.

12. The Applicant's Written Submissions were dated and filed on 27th September 2021 while those of the 1st Respondent were dated 24th September 2021 and filed on 27th September 2021.

13. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

14. The Applicant submitted that the parameters of Judicial Review were set out by the Court of Appeal in **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No 185 of 2001**(eKLR citation not given) and **Republic vs Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] eKLR** where the courts therein held that Judicial Review is concerned with the decision-making process and not with the merits of the decision.

15. It pointed out that Judicial Review was no longer a common law prerogative but was now a constitutional principle. It submitted that an order of Judicial Review was one of the reliefs for the violation of fundamental rights and freedoms under Article 23(3)(f). It also placed reliance on Section 7 of the Fair Administrative Action Act where it provides that any person who is aggrieved by an administrative action or decision may apply for review of the said administrative action or decision.

16. It further contended that pursuant to the rule of law, disputes as to the legality of acts of governmental parastatals demanded that such bodies must exercise their administrative powers in accordance with written law and established procedure.

17. It invoked Article 47 of the Constitution of Kenya 2010 and Section 4(3) of the Fair Administrative Action Act No 4 of 2015 and argued that the Respondent did not follow any of the procedures as spelt out in the cited provisions. It was categorical that it was not given prior and adequate notice of the nature and reasons, an opportunity to be heard, the information, material and evidence to be relied on, and was not accorded any opportunity to examine the products.

18. It questioned the criteria that was used to come up with the decision and how it was supposed to authenticate the alleged product as its own.

19. It also placed reliance on the provisions of Section 28 of the Regulation 11 of the Food, Drugs and Chemical Substances (General) Regulations, 1978 Regulations which sets out the procedure of taking samples and form of certificate of analysis. It was emphatic that it was not granted an opportunity to inspect the samples alleged to have been contaminated which made it absolutely impossible to ascertain the presence, nature and origin of the said contaminants and whether it manufactured the said samples. It also stated that it was not given an opportunity to make representations on the contamination prior to the decision made to seize an entire batch of its products

20. It added that the samples were not submitted to the public analyst for examination begging the question why the 1st Respondent concluded that there were foreign materials and why no certificate issued to it as the procedure demanded.

21. It was its submission that the notion of **"public interest"** was multifaceted in that it was also public interest for citizens not to be subjected to arbitrary seizures which would violate other fundamental rights and freedoms and make a mockery of the Constitution of Kenya. It submitted that the entire process of seizure of its products was fraught with illegalities and could not get the protection of the law.

22. It relied upon several cases amongst them the case of **Standard Newspapers Limited & Another vs Attorney General & 4 Others [2013] eKLR** where the common thread of the decisions was that seizure of properties must follow the due process of the law.

23. It urged this court to indemnify it for the loss that it had suffered for the loss of business and the costs of the present application.

24. The 1st Respondent agreed with the Applicant that judicial review applications do not deal with the merits of the case but rather, only with the process. In this regard, it placed reliance on the case of **Republic vs Public Procurement Administrative Review Board & Others Ex parte Rongo University [2018] eKLR** where the court cited the case of **Republic vs Attorney General & 4 Others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji** (eKLR citation not given). However, it argued that the Applicant appeared to have been aggrieved by the decision rather than the process that was followed.

25. It was emphatic that through its letter dated 13th March 2019 addressed to the Applicant, it indicated that there were foreign particles in the Applicant's products which were in the market and that such foreign particles contravened the provisions of Section 3 of the Food, Drugs and Chemical Substances Act. It added that in the said letter and as was required of it under the Act, it informed the Applicant of the removal of the contaminated products from the market.

26. It contended that in the Applicant's response to its said letter, the Applicant apologised for the contaminated products and therefore acknowledged the contamination of its products in the market.

27. It was categorical that it acted under Section 32(1) of the Food, Drugs and Chemical Substances Act, seized and removed the said contaminated products from the market to safeguard the health of the public. It emphasised that it had a statutory duty under the said Section to seize and remove from the market any food product that is or may be injurious to the public health.

28. It further invoked Section 30 of the aforesaid Act and argued that having established that the products were contaminated, releasing them back to the market would jeopardise public health which it, as well as this court, is under a duty to safeguard.

29. It was categorical that its duty was to protect and guard the health of the public against exposure to health hazards and if an order of prohibition and mandamus would be granted, such orders would operate to prevent it from carrying out its mandate of market surveillance thereby compromising the public health.

30. In this regard, it placed reliance on the case of **Bogonko vs National Environment Management Authority [2006]1 eKLR** where the court held that the remedy of judicial review being a public law remedy, the court would obviously weigh the public interest vis a vis the rights of the Applicant.

31. It averred that in the said case, the court therein was reluctant to grant an order of *certiorari* to quash the decision of the respondent therein taking into account that the public interest involved far outweighed the applicant's individual's rights to putting up a petrol station to earn a living.

32. Notably, the contents of the impugned letter dated 13th January 2019 were not disputed by the 1st Respondent. Both parties were also in agreement as to the purpose of Judicial Review proceedings. What appeared to be the issue in contention herein was whether the process of seizing the Applicant's goods complied with the law and if not, if its rights to fair administrative action were infringed upon in the exercise of that power.

33. Section 30(1)(e) of the Food, Drugs and Chemical Substances Act provides as follows:

> **"An authorized officer may at any hour reasonable for the proper performance of his duty-**
>
> **(e) seize and detain for such time as may be necessary any article by means of or in relation to which he believes any provision of this Act or any regulations made thereunder has been contravened.**

34. Section 30(11) of the Food, Drugs and Chemical Substances Act states that:-

> **"An authorized officer may submit any article seized by him or any sample taken by him to a public analyst for analysis examination; and a public analyst shall as soon as practicable analyse or examine any sample sent to in pursuance of this Act**

and shall give the authorized officer a certificate specifying the result of the analysis or examination and such certificate shall be in such form as may be described by the Minister on the advice of the Board"

35. Further, Section 32(1) of the Food, Drugs and Chemical Substances Act provides that:-

"It shall be the duty of every municipal council to exercise such powers with which it is invested as may be, in its special circumstances, reasonably practicable so as to provide proper safeguards for the sale of food, drugs, cosmetics, devices and chemical substances in a pure and genuine condition, and in particular to direct its officers to procure samples for analysis.

36. It is evident from the provisions of section 30(1)(e) of the Food, Drugs and Chemical Substances Act that the 1st Respondent has power to seize any products whenever it believed they had contravened the provisions of the said Act. Notably, there was no statutory pre-condition to the exercise of that power.

37. However, this power cannot be read to the exclusion of Section 4(1) and 4(2) of the Fair Administrative Action Act that provides as follows:-

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

38. In addition, Section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:-

3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a. prior and adequate notice of the nature and reasons for the proposed administrative action;

b. an opportunity to be heard and to make representations in that regard;

c. notice of a right to a review or internal appeal against an administrative decision, where applicable;

d. a statement of reasons pursuant to section 6;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

a. attend proceedings, in person or in the company of an expert of his choice;

b. be heard;

c. cross-examine persons who give adverse evidence against him; and

d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing."

39. The importance of fair hearing was emphasised by the Court of Appeal in the case of **David Oloo Onyango vs Attorney General [1987] eKLR** when it observed as follows:

"There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice."

40. The question of whether or not the Applicant's goods were contaminated was a matter of fact that it was required to rebut by providing evidence to the contrary. The 1st Respondent did not provide proof of any prior notice it issued to the Applicant for it to discharge its duty. The impugned letter merely indicated the decision the 1st Respondent had already made regarding the Applicant's products.

41. Notably, in its letter dated 13th March 2019, the Applicant requested the 1st Respondent to seize the sample that was affected until investigations were concluded. It was the Applicant's legitimate expectation that the 1st Respondent would proceed in accordance with the Food, Drugs and Chemical Substances Act.

42. The 1st Respondent did not seize a sample and/or provide a Certificate of analysis of a government analyst to prove that the said samples were contaminated as contemplated in Section 30 (11) and Section 32 (1) of the Food, Drugs and Chemical Substances Act respectively.

43. In the present application, the impugned letter did not bear reasons as to why the 1st Respondent made the decision to seize the Applicant's products from the market, no notice was given to the Applicant as required by law thus effectively denying him an opportunity to state his case as regards the said contaminated products.

44. The 1st Respondent was bound to observe the requirements of natural justice and apply the provisions of the Fair Administrative Act. This court therefore found that there was procedural impropriety and unfairness on the part of the 1st Respondent in the making of the decision in the letter dated 13th January 2019 and that the impugned decision contravened the provisions of Article 47 of the Constitution of Kenya that stipulates that:-

> **1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

45. Going further, Article 23 (3) of the Constitution of Kenya, states as follows:-

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

> **a. a declaration of rights;**
>
> **b. an injunction;**
>
> **c. a conservatory order;**
>
> **d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
>
> **e. an order for compensation; and**
>
> **f. an order of judicial review.**

46. Having said so, this court noted that although the Applicant had prayed for costs on the loss it made as a result of the impugned letter, it did not prove the same. There was no evidence that the 1st Respondent acted on its letter of 13th March 2019 and seized all its products. Every breach must be accompanied by either a quantifiable or unquantifiable loss for it to be compensated.

47. In the absence of proof of such financial loss, this court was only persuaded to grant an order for Judicial Review against the 1st Respondent herein as provided in Article 23(3)(f) of the Constitution of Kenya. No order could issue against the 2nd and 3rd Respondents as they were merely discharging their mandate of judicial function and prosecutorial powers as provided in Article 159(1) and Article 157(4) of the Constitution of Kenya respectively.

48. Unless there are compelling reasons, a successful party must be awarded costs of any proceedings. This court did not see any exceptional reason to depart from the general principle that costs follow the event.

DISPOSITION

49. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 18th December 2019 and filed on 19th December 2019 was merited and the same be and is hereby allowed in terms of Prayer 1 in the following terms:-

> **a. An Order of *Certiorari* be and is hereby issued quashing the 1st Respondent's letter dated 13th January 2019 authorising seizure of the Applicant's product from the market.**
>
> **b. The 1st Respondent will bear the Applicant's costs of these Judicial Review proceedings.**

50. It is so ordered.

DATED and **DELIVERED** at **KISUMU** this **23rd** day of **February 2022**

J. KAMAU

JUDGE