Republic v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 others; Terra Firma Logistics Limited & 3 others (Exparte) (Miscellaneous Application E002 of 2021) [2022] KEHC 11599 (KLR) (Judicial Review) (21 February 2022) (Judgment)

Neutral citation: [2022] KEHC 11599 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E002 OF 2021

J NGAAH, J

FEBRUARY 21, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES & CO-OPERATIVES ..... 1ST RESPONDENT

DIRECTOR GENERAL, AGRICULTURE AND FOOD AUTHORITY .... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

TERRA FIRMA LOGISTICS LIMITED ..... EXPARTE

SAFA AGENCIES LIMITED ..... EXPARTE

ARBAAH AGENCIES LIMITED ..... EXPARTE

TASLEEM INVESTMENT LIMITED ..... EXPARTE

JUDGMENT

1 The motion before court is dated 20 January 2021 and is filed under Sections 8 and 9 of the *Law Reform Act* and Order 53 rule 3 of the Civil Procedure Rules. The prayers have been framed as follows:

1) An order of certiorari be issued bringing into this Honourable Court for purposes of quashing The Crops (sugar) (Imports Exports and By-products Regulations), 2020 vide Legal Notice No. 125 (Legislative Supplement No. 76).

2) An order of certiorari be issued bringing into this Honourable Court for purposes of quashing the 2nd respondent's (i.e. the Agriculture and Food Authority's) Guidelines for Importation of Brown Sugar as endorsed by the first respondent on 3rd August 2020.

3) Costs of this suit be granted to the Applicants."

2 According to the verifying affidavit in support of the facts sworn by Joram Shivachi, who has described himself as a director and shareholder in the 1st applicant company, the applicants are companies which are stakeholders in the industry of importation of brown sugar in Kenya.

3 In July 2020, the cabinet secretary for Agriculture, Livestock, Fisheries and Co-operatives, gazetted the Crops (sugar) (Imports Exports and By-products Regulations), 2020 (which I will henceforth refer to as simply, "the Regulations") vide Legal Notice No. 125 (Legislative Supplement No. 76).

4 According to the deponent, the Regulations are alleged to have introduced "*new modus operandi which is quite unpredictable and vague particularly in the way in which importers import brown sugar into Kenya".* They are also alleged to have been introduced without any public participation.

5 The 2nd respondent is sued for publishing Guidelines for Importation of Brown Sugar (which I will henceforth refer to as "the Guidelines") which were later endorsed by the 1st respondent on 3 August 2020.

6 According to the applicants, the Guidelines were neither gazetted in the Kenya Gazette nor advertised in any newspaper. Again, there was no public participation in their formulation.

7 The deponent has further deposed that although the 1st respondent was summoned by the Senate sessional committee on delegated legislation to answer questions regarding the introduction of the regulations, he failed to appear before the committee.

8 It is also the applicants' case that the Regulations and the Guidelines do not comply with the Statutory Instruments Act, 2013.

9 It is alleged that the Regulations have introduced what the applicant has described as "exorbitant" annual registration fees and annual permit application fees amounting to Kshs. 200,000/= which is twice the amount charged previously.

10 Even then, licences for the importation of brown sugar are given to few select individuals leaving out other applicants whose applications are never given any consideration.

11 The 1st respondent swore a replying affidavit opposing the applicant's application. He deposed that the records from the 2nd respondent's Integrated Management Information System (AFA-IMIS) indicate that the 3rd applicant was incorporated on 22 August 2014. However, there are no records in the same database to ascertain the registration status of the 1st, 2nd 4th and 5th respondents.

12 He admitted that he gazetted the Regulations through Legal Notice No. 125 of 10 July 2020 as prescribed under section 40 of the *Crops Act*, 2020. These Regulations clearly outline the process and requirements for importation of sugar and sugar by-products into this country and they are not vague or unpredictable as alleged. Again, there is no mention of import of brown sugar in the Regulations. Contrary to the applicant's allegations, the Regulations are meant to address existing challenges in the sugar industry in this country.

13 The formulation of the Regulations followed the due process including stakeholder participation and, in particular, was consistent with the requirements of *the Constitution*. Apart from public

participation, the Regulations were presented to and endorsed by a committee of the National Assembly and the Senate which paved the way for their implementation.

14 The 1st respondent denied having endorsed any Guidelines, published by the 2nd respondent for the importation of brown sugar.

15 The 1st respondent also admitted having been invited by the Senate to respond to various issues touching on the Regulations and other regulations in the horticulture, fibre crops and nuts and oils value chains. He submitted a written report, a copy of which was exhibited to his affidavit, in answer to the queries raised by the Senate.

16 He controverted applicant's allegations that the Regulations do not comply with the Statutory Instruments Act and exhibited to his affidavit a copy of the Regulatory Impact Assessment and a certificate of compliance showing that indeed the Regulations complied with provisions of the said act.

17 As far as the question of fees is concerned, the 1st respondent deposed that the fees are prescribed in the Regulations and that there are no guidelines introducing any extra fees or levies of any kind. Payment of fees is one, among many other requirements, that an applicant for importation of sugar has to comply with before a valid import permit is issued.

18 Upon payment of the fees, importers are expected to upload the evidence of payment together with other requirements on AFA-IMIS where all registration certificates and annual import permits are processed.

19 The process of allocation and issuance of pre-shipment approval letters is managed through committees guided by internal "Standard Operating Procedures (SOPS)" that are anchored in the Regulations.

20 The 2nd respondent has implemented a fully digitised and automated system of issuance of registration certificates, import permits and pre-shipment approval letters which is open, efficient, fast and transparent. The system is linked to KENTRADE/ Kenya National Single Window System portal which facilitates online clearance of import/export consignments.

22 It is the 2nd respondent's case that the applicants have been unable to successfully lodge their documents and applications as required but have not sought any assistance from the authority on the challenges they may be facing for appropriate assistance.

23 Rosemary Owino, who is the head of the Sugar Directorate of the Agriculture and Food Authority in the Ministry of Agriculture, Livestock, Fisheries and Co-operatives, swore that apart from Arbaah Agencies Limited which was incorporated on 22 August 2014, there are no records in the Authority's Integrated Management Information System (AFA-IMIS) data base with respect to the rest of the applicants and therefore they have no valid permits for importation of sugar for the 2020/2021.

24 In any event, Thirdware Investments Limited was only registered on 2 October 2020 and has not even completed the application process to acquire the Annual Import Permit.

25 Arbaah Agencies Limited was registered on 18 September 2020 with the Authority and acquired the Annual Import Permit on 30/10/2020. It has, however, not finalised the online process for importation of sugar as required by the Authority.

26 The 2nd respondent's position is that the impugned Regulations clearly outline the process and requirements for importation of sugar and sugar by-products into this country. She agrees with the 1st respondent that the Regulations were meant to address existing challenges in the sugar industry in Kenya.

27 Further, the formulation of the Regulations was subjected to public participation and that they duly complied with the Statutory Instruments Act. The rest of the 2nd respondent's depositions were in the same terms as those made by the 1st respondent.

28 One of the vital components of an application for judicial review is the grounds upon which it is made. They are important because Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) 2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

29 And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

What are these grounds?

30 The grounds for judicial review were enunciated in the English case of Council **of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410** in which Lord Diplock set out the three heads which he described as "***the grounds upon which administrative action is subject to control by judicial review***". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> ***My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.***
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous

> in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow [1956] A.C. 14* of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

31 These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. I suppose it is in this spirit that the principle of proportionality as a further ground for judicial review has been developed.

32 Turning back to the applicant's application, it is not apparent from the statement accompanying the application which of the grounds of judicial review the applicants are relying upon. They have not stated in precise, specific and unambiguous terms the ground or grounds for judicial review upon which they seek this Honourable Court's intervention in their bid to impeach the impugned Guidelines and Regulations. What they have presented as grounds have been couched as follows:

1. The applicants are companies duly incorporated in the Republic of Kenya under the *Companies Act*, cap. 486 and the *Companies Act* 2015.

2. The applicants are stakeholders in the industry of Importation of brown sugar in the Republic of Kenya.

3. In July 2020 or thereabouts, the cabinet secretary for Agriculture, Livestock Fisheries and Cooperatives gazetted the Crops (sugar) (Imports Exports and By-products Regulations), 2020 vide Legal Notice No. 125 (Legislative Supplement No. 76).

4. The said regulations introduce a completely new modus operandi which is quite unpredictable and vague particularly in the way in which importers import brown sugar into Kenya.

5. The said regulations were introduced without any public participation despite the very delicate and controversial nature of sugar importation and consumption in the Republic of Kenya.

6. The 2nd respondent (Agriculture and Food Authority's (sic)) thereafter published their Guidelines for Importation of Brown Sugar which were endorsed by the 1st respondent on 3rd August 2020.

7. The said guidelines were never gazetted in the Kenya Gazette nor advertised in any newspaper despite the public interest involved. Of Course, no public participation was done in this regard.

8. Vide a letter date 23 November 2020, the 1st respondent was invited by the Senate sessional committee on delegated legislation for a virtual zoom meeting/session to respond to the Senate's queries on the introduction and implementation of the Crops (sugar) (Imports Exports and By-products Regulations), 2020 vide Legal Notice No. 125 (Legislative Supplement No. 76) among other regulations.

9. The first respondent did not attend the said invitation by the Senate of the Republic of Kenya.

10. The Crops (sugar) (Imports Exports and By-products Regulations), 2020 and the 2nd respondent's Guidelines for the Importation of Brown Sugar do not comply with the Statutory Instruments Act, 2013 and the respondents made no effort at all to comply with the said Act.

11. Particularly, the new Regulations and Guidelines introduced new exorbitant annual registration fees and annual permit application fees amounting to Kshs. 200,000/= which is double of the only fees.

12. Despite payment of the new fees by some stakeholders in the industry of importation of brown sugar, the licences for importation of brown sugar are given to just a few select persons whereas applications by many of the other stakeholders do not get any consideration.

13. The respondents here acted clandestinely in the vague manner in which they introduced, gazetted and started the discriminatory implementation of the impugned regulations and ad hoc guidelines and they seem to have done so for the selfish benefit of a few influential persons in Kenya at the expense of the applicants and other hoi polloi.

14. The respondent's handling of brown sugar importation industry reeks of malice, rent seeking and grand corruption due to the opaqueness of the impugned regulations and guidelines."

33 Reading these passages, it is not clear which of the ground or grounds of judicial review the applicants have anchored their application. I would be speculating if I was to proceed on the presumption that the applicants' application is based on any particular ground or grounds.

34 But the court cannot, and need not speculate on what is on the mind of any particular applicant because it is the applicant's obligation, in the first place, to state categorically the ground or grounds upon which he seeks a judicial review court to intervene and impeach the administrative action in issue.

35 While reiterating the importance of stating grounds for judicial review in concise and precise terms **Michael Fordham** in his book, **Judicial Review Handbook,** at Paragraph 34.1 states as follows:

> ***The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."***

36 The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in *pari materia* with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

37 It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. The applicants' application is such an application and for this reason it cannot see the light of day.

38 That said, assuming that the grounds had been spelt out, it has not been demonstrated that the impugned Regulations and Guidelines are "unpredictable and vague".

39 As far as the Crops (sugar) (Imports Exports and By-products) Regulations, 2020 are concerned, apart from the general remarks that the Regulations are vague, it has not been demonstrated in what respect the Regulations are of such character.

40 On the question of public participation, there is uncontroverted evidence that members of the public were invited to make representations on the Crops (sugar) (Imports Exports and By-products) Regulations, 2020. An advertisement published in the press and Kenya Gazette shows that the Cabinet Secretary invited comments for consideration from the general public and the stakeholders in the sugar industry on the draft regulations before they were formulated and published.

41 Also exhibited to the respondents' affidavits is a certificate of compliance with the Statutory Instruments Act to the effect that Crops (sugar) (Imports Exports and By-products Regulations), 2020 complied with the Statutory Instruments Act No. 3 of 2013.

42 Again, there is evidence of a letter of 5 November 2020, according to which the National Assembly confirmed and satisfied itself that the Regulations are in accord with the provisions of *the Constitution* of Kenya.

43 Needless to state, judicial review, as always, is concerned with process and not the merits of the decision. It is therefore not for this court to go into the merits of the decision of hiking fees for import licences.

44 One other thing, the applicants have described themselves as "*stakeholders in the industry of importation of brown sugar in the Republic of Kenya*". This allegation has been controverted by

Rosemary Owino, the head of the Sugar Directorate of Agriculture and Food Authority in the Ministry of Agriculture, Livestock, Fisheries and Co-operatives.

45 According to Owino's affidavit sworn on 15 February 2021, the applicants are not *bona fide* stakeholders in the importation of brown sugar as alleged.

46 She explained, an explanation that has not been refuted, that while the Food and Agriculture Authority's management integrated information system shows that the 3rd applicant was incorporated on 22 August 2014, there are no records in the same database to ascertain the registration status of the rest of the applicants. There is no evidence that they have a valid registration for the 2020/2021. Accordingly, they have no valid permits for the importation of sugar in Kenya for the year 2020/2021.

What this implies is that the applicant suppressed facts material to the application.

47 In the final analysis, I do not find any merit in the applicant's application particularly so, when the applicants neither stated the grounds upon which their application is based nor proved them. The applicants do not deserve judicial review orders of certiorari. The motion dated 20 January 2021 and filed in this Honourable Court on 21 January 2021 is therefore dismissed. I make no order as to costs.

DATED, SIGNED AND DELIVERED ON 21 FEBRUARY 2022

NGAAH JAIRUS

JUDGE