REPUBLIC OF KENYA

IN THE HIGH CUORT OF KENYA AT MERU

JUDICIAL REVIEW MISC APP NO 2 of 2018

REPUBLIC.....APPLICANT

VERSUS

AGRICULTURE AND FOOD AUTHORITY..... RESPONDENT

EX-PARTE.....NJIRU INDUSTRIES LIMITED

RULING

1. A Notice of Motion dated the 12th day of July was filed on the same day and seeks, among other orders, a substantive order that the key personnel of the of the respondent's Tea Directorate to attend court and show cause why they shouldn't be committed to civil jail for disobedience of the court orders issued on the 30.07.2018 requiring the directorate to hear and expeditiously determine the applicants application for variation of its license and an order that the respondent reviews the status of competition within the sector in the country for the year ending June 2020 and to align the regulatory and operating frameworks to the Competition Act.

2. The application was supported by the Affidavit of Henry Paul Njeru whose gist was that upon the delivery of the judgment the respondent filed a Notice of appeal but neither sought nor obtain any stay of the orders directing expeditious determination of the application which expired on the 90th day after the judgment without any tangible effort by the respondent. That the application was in deed gazetted but so gazetted rather late and was allowed but upon unreasonable conditions disregarding the law, reason, policy, precedent, regulation, Fair administrative Act as well as the competition Act and geared towards frustrating the applicant's business. That Affidavit in support exhibited the Judgment of the court and a series of correspondence between the parties all intended to show that the order of the court was complied with late and that subsequent applications were received but not responded to or dealt with in an expeditious manner.

3. The application was resisted by the respondent by a Replying Affidavit sworn by Mr Anthony Muriithi, the interim head of Tea at the Agriculture and food Authority, on the 11.10.2019. In summary, the Affidavit takes the position that upon the delivery of the judgment, it felt aggrieved and filed a Notice of Appeal whereafter the applicant approached the respondent with a proposal to settle, a tentative agreement was reached that tea hawking would be fought; the respondent would visit the applicants premises to evaluate the applicant's compliance levels with licensing requirements and that the applicant would forfeit costs of this matter as a consideration of the respondent withdrawing the Notice of Appeal. When the applicants advocate came up with the draft consent, the same was not acceptable to the respondent culminating in a protracted correspondence which came to naught. The accusation of failure to act expeditiously and within the law was denied with the respondent stressing that that it duly considered all material matters and came to a conclusion that the applicant was only qualified to manufacture Black CTC with a proven capacity of 5 million kilograms of green tea at its disposal.

4. The accusation that the respondent engaged in smear campaigns and discriminative treatment against the applicant was denied it being asserted that the sagana meeting was for all tea producers/manufacturers from east of the Rift valley to address tea hawking and all, including the applicant, were invited and the applicant in deed duly acknowledged the invitation by attendance as shown in the list of attendees and that the resolutions were availed to all the tea stakeholders.

5. On failure to provide to the applicant the evaluation report prepared by the technical team on the applicant's application, the response was that that is an interim internal document that is considered by other two other committees and is never released to the applicant as only the decision is communicated and that the licence allegedly uploaded onto the respondent's website was an erroneously done as the document was signed by an officer who left the directorate way back in 2014 and that a decision was made to consider a licence for the year 2019/2020 rather than that of 2018/2019 which had lapsed. A rather inauspicious deposition is then made that the applicant had never applied for nor issued with a licence to manufacture black CTC teas with a manufacturing capacity 2 million kilograms' green tea leaf tor it to seek and get a renewal for 2019/2020.

6. On the application of march 2018, the subject of these proceedings, the response given to the complaints was that that application was initially made for a licence with an unlimited capacity which the respondent never gives, the applicant was duty directed, and he amended same to reflect a capacity of 10 million kilograms of tea leaf from its then subsisting licence with a capacity of 2 million kilograms. It is the respondents position that in considering an application, the law under the Crops Act and Tea Licensing Registration and Trade Regulations require it to ensure that processing beyond capacity is not created and in compliance with the law the application was processed and a licence

to manufacture 5 million kilograms issued based on the data provided by the applicant and that several objections received from other entities were never considered having been lodged late. There was a further consideration of the data on outgrowers and a visit by the technical team in the company of the applicant to the registered outgrowers established that the data given on the farm sizes were inaccurate as some of those farms had been subdivided and current registered proprietors were supplying tea leaf t0o other processors.

7. The complaint that the respondent imposed conditions contrary to the court order to protect and favour the dominant actors and contrary to advice by the competition authority, was countered with a response that the same is moot and not available for determination here as much as the named third parties have not been made parties to give them a chance to be heard but in any event the law, sections 20 and 22 of the Crops Act empowers the respondent to issue licences subject to conditions it may be determined and prescribed by the authority at the time of issue and even thereafter. Favour to any other person was denied it being reiterated that the conditions imposed were justifiable and lawful it being further denied that the small tea factories in the Meru area have never been asked to produce own leaf and expanded their capacity without approval of the respondent. A strong statement was made to the effect that the positions taken by the applicant at paragraph 21 to 30 of the Affidavit in support amount to invitation upon the court to sit on appeal on the decision of the respondent and to substitute its discretion for that of the respondent by usurping the statutory mandate of the respondent. The respondent then pleaded not being in contempt, asserted having complied with the law and the court order, challenged the applicant to demonstrate breach or violation and prayed that the application to be dismissed for being bereft of merit.

8. The application was canvassed by way of written submissions filed by the applicant on the 03.11.2020 and by the respondent on the 10.12.2020. I have had the benefit of reading the two submissions and I will, consider the application without the need to rehearse the same even as I duly consider same.

9. From the onset, I take the view that this application, coming as it has, after judgment, ought to be confined to what was on record as at the date of the judgment with only a window to demonstrate that the express terms of the judgment have been flouted by design to defeat the court process and demean due process. I take the view that any proceeding taken after a judgment must remain facilitative and toward the enforcement of the judgment, short of that be limited to preserving it by stay or varying it by review, where permissible, but should not appear to reintroduce new dispute or just expand the determined dispute as to reopen it for fresh re-litigation.

10. Having so said, I choose to coalesce and condense the six specific prayers in the application, after leaving out prayer **a,** and **i** into three for the purposes of this determination. I group prayers **b** and **f** into one, **c, d** and **e** into another while prayer **g** shall stand alone,

11. I consider prayers **(b), (c)** and **(e)** to have been overtaken by the event of hearing and determination, being done today, for two reasons: -

> (i) As crafted, any order that issues on those prayers would lapse the moment the determination is issued and such orders would be no more than superfluous and in vain.
>
> (ii) This being a judicial review matter, my appreciation of the law is that a prohibition rather than an injunction would be more efficacious but again that can only issue in the judgement not subsequently thereafter.

12. In effect those three prayers are incapable of grant and I thus order that they be and are hereby dismissed.

13. The crux of the motion must however remain prayers **b** and **f** which I see as complementing each other and ought not be dealt with disjunctively. In deed the judgment of 30.7.2018 mandated that the respondent to expeditiously hear and determine the applicant's application for variation of its licence in accordance with the law. However, no definite timelines were set by the court. It was them an obligation upon the respondent that the determination be done within a reasonable time. In the Affidavit sworn by Henry Paul Njeru in support of the application, the complaint is that the order was complied with but in expeditiously and when granted, oppressive conditions were imposed obviously disregarding the applicable law and the court order with the aim to frustrate the applicant and the small scale tea growers who had signed green leaf supply agreement with it. It is not that the order was not complied with. On the other hand, the respondent asserts that after the decision was delivered to the parties, and upon it filing a Notice of appeal, there was an approach by the applicant towards an out of court settlement which was given a chance before the application could be progressed. The determination of the application would thus seek to answer the question whether or not there had been a wilful breach of the terms of a court order.

14. The test to be applied in applications of this nature is whether the court issued an order with clear and unambiguous terms which terms were binding upon the respondent and were duly brought to the attention of the respondent, but the respondent has deliberately and willingly breached such terms.[1]

15. The material availed to me agree that the application was indeed heard and a determination rendered. The issue is whether there was delay in compliance with the terms of the judgment. While it is not disputed that the respondent had due notice of the order and its terms, it is not clear to me that there was clarity on the timelines within which the determination was to be rendered so as to delineate when the disobedience was committed. In the contrary I do find, from the numerous correspondence exchanged that any delay was occasioned by the negotiations initiated by the applicant. I determine that there having been no set deadline for compliance with the terms of the judgment, and there having been a determination of the application for variation of the licence, no disobedience or breach of the terms of the judgment has been demonstrated and the court thus cannot fault the respondent for disobedience of a court order. To find otherwise would be to blame the respondent for having sought to further the constitutional principle that alternative dispute resolution be encouraged. I find no merit in prayers **b** and **f** which I order dismissed.

16. The last prayer asks the court to direct the respondent to review the status of competition in the tea industry in Kenya during the final year ending on 30.06.2020 with particularity to the production, supply, manufacturing and diversification segments and to align same with the provisions of the competition Act. I do consider this to be a dispute not contemplated at the commencement of the suit and is thus a matter not properly due for determination here and at this juncture. It is a matter that ought to be properly brought and determined on own merits. At this juncture, the court has done its part in determination of the dispute as initiated by the summons dated the 29.03.2018 and it is now not open for the court to accept a new dispute that did not exist at the commencement of the matter.

17. In conclusion, I do find no iota of merit in the entire application which is hereby dismissed with costs.

Dated, signed and delivered virtually, by MS Teams, this 30th day of April 2021

Patrick J O Otieno

Judge

---

[1] Ochino and Another vs Okombo and Others (1989) eklr and amwel N M Mweru vs National Land Commission (2020) eklr