



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 256 OF 2018

CROWN CHEMICALS.....PETITIONER

VERSUS

KENYA BUREAU OF STANDARDS (KEBS).....RESPONDENT

JUDGMENT

1. The petitioner herein, who describes itself as a limited liability company incorporated under the Companies Act Cap 486 Laws of Kenya sued the respondent herein a statutory body established under the Standards Act Cap 496 seeking the following orders:

A. A declaration that the petitioner's right to own and control its own property as enshrined and contemplated in Article 40 of the Constitution, as espoused in Article 2 of the Constitution were violated by the negligent conduct of the respondent.

B. A declaration that the respondent compromised or violated the rights to fair administrative action and the legitimate expectation of the petitioner's under Article 47 of the Constitution.

C. A declaration that the information and advice issued by the respondents to the petitioners in the Certificate of Compliance date 27/6/2018 and which the petitioner relied on to pay the manufacture known as PALMTOP VEGEOIL PRODUCTS SDN BHD- MALAYSIA for a consignment of 6710 JERRYCANS PACKED IN 20 LITRES OF SHAKIRA BRAND VEGETABLE OIL which were worth approximately kshs 15,000,000/- (inclusive total value, shipping charges, VAT and other charges) was misleading, unprocedural and unlawful and in the circumstance, the respondent is responsible for the total losses and expenses incurred by the petitioners in relation to the consignment.

D. A declaration that the respondents decisions to continually and indefinitely withhold clearance of the perishable good aforementioned in C above since 19th June 2018 without issuing immediate notices to the petitioners and/their agents on the reasons for withholding the consignment amounts to gross violation of the petitioner's right to efficient and fair administrative action.

E. A declaration that as a result of the breach of rights enumerated in A-D above, the petitioner has suffered damages, massive loss of income, and a right to earn a living.

F. A declaration that the petitioner's discretion to issue manufactures with Diamond Marks of quality which importers/retailers rely on to order for goods from holders of the permits unconstitutional since its limits the rights to legitimate expectation that the goods do conform to the Kenyan standards, thereby exposing importers to imminent loss at the instance where the respondent decides to exercise its discretion under the Standards Act Cap 496 to randomly inspect imported goods.

G. A declaration that the petitioner is therefore entitled to special, general and exemplary damages against the respondents herein.

I. Special damages for value of 6,710 JERRYCANS PACKED IN 20 LITRES OF SHAKIRA BRAND VEGETABLE OIL- entry number E1806876929- Being USD 73,810 (Approximately 7,436,758/-).

II. Customs duty and VAT of the goods aforementioned in (1) above as paid to Kenya Revenue Authority being kshs 3,630,111/=.

III. Estimated profit from goods described in (1) above being kshs 6,710,000/-.

H. That the respondent shall bear all costs related to Customs Warehouse Rent payable to Kenya Revenue Authority as well as Kenya Port Authority storage charges AND the demurrage charges payable to C.M.A C.M.G. Group Limited that have accrued since 19th June 2018 and which have accrued in relation to the 6,710 JERRYCANS OF 'SHAKIRA BRAND VEGETABLE OIL EACH PACKED IN 20 LITRES under K.R.A. license number 2018 E1806876929 and entry number 20181CD 26736.

I. Compensation.

J. An order that the respondent bears the costs and interests of these proceedings.

K. Any other relief.

2. The petition is supported by the affidavits of the petitioner's director one **Charles Muriuki** and was opposed by the respondent through the replying affidavit of its acting head of inspections, **Birgen Rono**, sworn on 9th October 2018.

The petitioner's case

3. The petitioner's claim is that in the month of May 2018, it ordered for 6,710 jerrycans of 20 litres of 'Shakira' vegetable oil from a manufacturer in Malaysia known as Palmtop Vegeoil Products SDN BHD at a cost of kshs. 7,436,758/-. The petitioner contends that it performed due diligence before making the said order by ensuring that the manufacturer had obtained a permit to use the Diamond Mark of Quality issued by the respondent under the Standards Act and confirmed that the said manufacturer had indeed obtained a permit number 945 effective from 5th October 2016 to 4th October 2019 to show that the said vegetable cooking oil under the brand name 'Shakira' conforms with KS EAS 769: 12 fortified edible oils Fats specification.

4. The petitioner states that having ensured that the manufacturer had the requisite permit and was already certified by the respondent under the Diamond Mark of Quality Scheme, it was therefore exempted from the mandatory application of Import Standardization Mark (ISM) procedures issued under Legal Notice Number 78 of 15th July 2005.

5. The petitioner states that it is aware that the respondent has the discretion and statutory power to test any product entering the country and that it therefore took the precaution to negotiate an agreement with the manufacturer to the effect that payment for the product would only be made after a certificate of compliance was issued by the respondent on the arrival of the goods which clearances were procured by the petitioner's clearing agents.

6. The petitioner further states that on 20th June 2018, the respondent issued it with a sampling request form in order to draw samples from the cargo for inspection and quality analysis but that the respondent nonetheless issued the petitioner with the Local Certificate of Compliance on 27th June 2018 approving the status of the said goods.

7. It is the petitioner's case that upon being issued with the said Compliance Certificate, it went ahead and paid the manufacturer the full value for the goods and that it was therefore the petitioner's legitimate expectation that the respondent would immediately authorize the release of the goods after the issuance of the Compliance Certificate, but that in an unexpected turn of events, the respondent declined and/or refused to release the said goods and has not communicated the reasons for such refusal to the petitioner thereby causing it to suffer loss in respect to storage, demurrage charges and loss of business.

8. The petitioner contends that no written notice has been issued to it detailing the reasons as to why the goods cannot be cleared in accordance with the provisions of Section 14(b) (3) of the Standards Act. The petitioner maintains that since it relied on the Diamond Mark of Quality issued to the manufacturer by the respondent and the Certificate of Compliance issued to it on 27th June 2018, it had no reason to doubt the conformity of the goods to the requisite standards.

9. At the hearing of the petition, Mr. Wachira, learned counsel for the petitioner submitted that the respondent had not challenged the conservatory of orders issued on 24th July 2018 directing it to bear the costs of the Kenya Ports Authority together with the demurrage charges. Counsel submitted that the petitioner's rights under Articles 40, 47 and 50 of the Constitution had been violated by the respondent as the petitioner had fully complied with all the requisite procedures for the importation of goods contained in the Standards Act which also contains an express exception from inspection clause where a manufacturer has a Diamond Mark of Quality.

10. Counsel however conceded that Section 14 of the said Standards Act grants the respondent power to carry out random inspection of imported goods. It was submitted that having been issued with a certificate of conformity on 27th June 2018, the petitioner had a legitimate expectation that the goods would be released to it as if the goods were not in conformity, the respondent ought to have issued a notice to that effect within 14 days of the results so as to enable the petitioner lodge an appeal.

The respondent's case

11. Through the respondent's replying affidavit, sworn on 9th October 2018, the respondent states that one of its statutory functions is to make arrangements or provide facilities for the examination and testing of commodities so as to determine whether such commodities comply with the provisions of the Act or any other law dealing with standards of quality or descriptions.

12. The respondent deponent states that the respondent issued the petitioner with a sampling request on 28th June 2018 for inspection and quality analysis of the goods and that the issuance of the local certificate of compliance was only limited to approving the status of the goods

and not their quality and further that the issuance with such a certificate does not mean that the goods have passed the sampling process.

13. He states that the result of analysis of the petitioner's goods conducted on 27th July 2018 showed that they did not pass the vitamin A test and that the petitioner was duly informed of the test results and the reasons for the refusal to release the said goods. He attached a copy of the test results and a letter dated 27th July 2018 addressed to the petitioner to the replying affidavit as annexures "BR2" and "BR3".

14. It is the respondent's case that whereas it is true that the inspector can under Section 14(B) of the Act order for a conditional release, such a release is only tenable where an analysis has not been done or completed and that in the circumstances of this case, the analysis was concluded and its results released to the petitioner. He further states that under Section 14(B) (7) of the Act, goods of perishable nature are not subject to conditional release and further, that the petitioner had the option of appealing against the test results, which option it failed to take and instead rushed to court for redress.

15. At the hearing of the petition, Mr. Ombati, learned counsel for the respondent submitted that none of the petitioner's rights under Article 40, 47 and 50 were violated as goods were taken through the correct process of analysis/testing before being found to be unsuitable after which the test results were communicated to the petitioner.

Analysis and determination

16. I have carefully considered the pleadings filed herein and the parties' respective submissions. The issue for determination is whether it was established that the petitioner's rights under Articles 40, 47 and 50 of the Constitution were violated. The petitioner's case was that the failure by the respondents to release its goods amounted to a violation of its rights. The said Articles stipulate as follows:

Article 40 of the Constitution

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

(a) of any description; and
(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and
(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Article 47(1) and (2) of the Constitution

(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.

Article 50(1) of the constitution

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

17. The respondent's position on the other hand, was that it complied with other provisions of Section 14 of the Act regarding the request for samples of the imported goods for purposes of analysis to confirm if the said goods were suitable for consumption and that the results of the analysis showed that they did not pass the suitability test. The said Section 14 stipulates as follows:-

1) "An inspector may order the destruction of goods detained under Section 14(1) if the following conditions are satisfied:

a) Testing indicates that the goods do not meet the relevant Kenya Standard: and

b) It is reasonably necessary to destroy the goods because the goods are in a dangerous state of injurious to the health of human beings, animals or plants.

2) In an order under subsection (1) the inspector may require the owner of the goods to pay the costs of the destruction of the goods including the costs of transporting and storing the goods before destruction.

3) At least fourteen days notice shall be given of an order under subsection (1) either by giving the owner of the goods a written notice or by publishing a written notice in the gazette.

4) Any person who is aggrieved by an order under subsection (1) may, within fourteen days of the notice of the order under Subsection (3), appeal in writing to the Tribunal.

5) An order under subsection (1) shall not be carried out until the time for appealing to the Tribunal has expired and, if the order is appealed, the order shall not be carried out until the Tribunal has dealt with the appeal.

6) If the goods in respect of which an order under subsection (1) is made have not been entered into Kenya within the meaning of the Customs Exercise Act the goods may be exported and, if the owner of the goods gives an undertaking to export the goods, the order shall not be carried out until at least thirty days after the notice of the order under subsection (3).

7) No inspector shall be personally liable for making an order under subsection (1) in good faith.

8) No person shall be personally liable for carrying out an order under subsection (1) in good faith.

9) For greater certainty, subsections (7) and (8) do not relieve the Bureau of any liability it may have with respect to an order that is made or carried out otherwise than in accordance with this section.

10) For the purposes of carrying out his duties under the Act, every inspector shall have the powers, rights and privileges specified in Section 14 and the protection of a police officer.

11) An inspector who-

a) Directly or indirectly solicit for, or receives in connection with any of his duties, a payment or other reward whatsoever, whether pecuniary or otherwise, or a promise or security for any such payment or reward not being a payment or reward which he is lawfully entitled to claim;

b) Enters into any agreement to do, abstain from doing, permit, conceal or connive at any act whereby the Bureau is or may be defrauded, or which is contrary to the provisions of this Act or the proper execution of the duty of that officer; or

c) Discloses, except for the purposes of this Act or when required to do so as a witness in a court of law or with the approval of the Director, information acquired by him in the performance of his duties relating to a person, firm or business of any kind; or

d) Uses his position to improperly enrich himself or others, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding one million shillings or both and any money, property or reward obtained fraudulently or any property acquired using money obtained fraudulently shall be forfeited to the Government.

12) A person who, with the intention of defrauding the Bureau-

a) Directly or indirectly offers to give an inspector a payment or reward, whether pecuniary or otherwise, or makes a promise or security for any such payment or reward; or

b) Promises or enters into an agreement with an inspector in order to induce him to do, abstain from doing, permit, conceal or connive, at, any act whereby the Bureau may be defrauded, or which is contrary to the provisions of this Act for the proper execution of the duty of that inspector,

Shall be guilty of an offence and liable to imprisonment as prescribed under subsection (11).

18. I have perused annexure "BR3" attached to the respondent's replying affidavit and I note that it is a letter dated 25th July 2018 addressed to the petitioner wherein the respondent states as follows:-

"Enclosed is a laboratory test report for sample Ref No. BS201820867 for cooking oil imported through ICDE by yourselves from Malaysia vide Customs Entry No. 26763 and accompanied by Diamond Mark Permit No. 945. A sample was drawn from your said consignment on 21st June 2018 by our Import Inspection Officer.

The sample was tested against KS EAS 769:2012 Kenya Standard Specification for fortified edible oils and fats and failed to comply with requirements of the standard in vitamin A parameter.

Consequently, the cooking oil has been rejected and you are advised to reshipe it back to the country of origin within 30 days from the date of this letter failure to which the same shall be destroyed without further reference”.

19. The petitioner denied that it was served with the said letter (annexure “BR3”) and added that the purported test results, if any, were issued beyond the 14 days stipulated in Section 14(B) of the Act which was a confirmation that there was violation of the it’s right to fair administrative action.

20. From the evidence presented before this court, it is worthy to note that the following facts were not disputed”

a) That the petitioner ordered for 6,710 jerrycans of 20 litres Shakira vegetable Oil from a Malaysian manufacturer known as Palmtop Vegeoil at a costs of 7,436,758.

b) That the respondent had issued the said manufacturer with the Diamond Mark of Quality which permit was to be in force from 5th October 2015 to 4th October 2019.

c) That the aforesaid ordered goods arrived at the port of Mombasa on 19th June 2018 after which the petitioner’s clearing agent duly paid custom value and Value Added Tax to the Kenya Ports Authority amounting to kshs 3,639,111/- as shown in annexure “CM4” to the petitioner’s affidavit.

d) That on 20th June 2018, the respondent issued the petitioner with a sampling request form order to draw samples from the cargo for inspection and analysis.

e) On 12th June 2018 the respondent issued the petitioner with the local certificate of compliance.

21. The point of departure between the parties was that the respondent failed, refused and/or neglected to issue the petitioner with the results of the analysis of the samples from the cargo within the period provided for under Section 14B of the Act or at all thereby prompting the petitioner to file the instant petition for redress.

22. Section 14B(3) of the Act stipulates as follows:

“ Where the goods are released under Subsection (1) or retained under Subsection (2), the inspector shall ensure that the samples are tested and the results thereof released to the manufacturer, importer, dealer, seller or agent within fourteen days after the testing period of such samples.”

23. I have carefully perused the respondent replying affidavit together with the annexures attached thereto. I note that even though the Laboratory Test Report dated 4th July 2018 (annexure “BR2”) indicates that the sample was received on 22nd June 2018, the date of the analysis is indicated as 4th July 2018. My take is that considering that the Laboratory Test Report is dated 4th July 2018, one can say that as at the time of the said report, the test analysis of the cargo had been concluded in which case the 14 days period within which the test results ought to have been released to the petitioner under Section 14B (3) of the Act started to run on the said date. That being the case, it follows that the respondent ought to have informed the petitioner of the outcome of the laboratory test as at 18th July 2018 or at worst, 19th July 2018.

24. The respondent contends that it sent a letter dated 27th July 2018 to the petitioner to inform it of the test results and the instant petition was filed on 20th July 2018.

25. Going by the above dates of the activities that preceded the filing of this petition, it is clear to me that the respondent did not inform the petitioner of the outcome of the laboratory test of their products within the time stipulated by the Act or at all and that the respondent only made the petitioner aware of the said results on 25th July 2018 several days after the filing of this petition and after it was served with the pleadings herein.

26. No material was placed before this court to show that the petitioner was informed of the outcome of the analysis of their goods.

27. For the above reasons, I find that the respondents, through their own delay, laxity or neglect of duty and the law violated the petitioners right to under Articles 40, 47 and 50 of the Constitution whose particulars provisions I have already highlighted in this judgment.

28. From the facts of this case and considering that todate, the respondents have not released the petitioners cargo to it. It goes without saying that the petitioner has been denied the right to the goods that they imported at a very heavy cost.

29. Article 47 of the Constitution entitles the petitioner to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

30. In the instant case, I find that the action taken by the respondent to subject the petitioners goods to further analysis/tests was an administrative action for which the Act provides for a time line within which the analysis is to be conducted and results made known to the

affected party. The urgency in the release of the affected goods is further made more pronounced by virtue of the fact that the goods in question are perishable for which the time of release and sale are of essence.

31. Needless to say, the loss in terms of loss in business that may be occasioned to any businessman by the delay in the release of his imported goods cannot be gainsaid.

32. My finding is that the petitioners rights to fair administrative action under Article 47 of the Constitution were violated.

33. Turning to the claim on violation of the right to fair hearing under Article 50 of the Constitution, I find that by failing to release the analysis test results to the petitioner within the stipulated 14 days period, the respondents denied the petitioner the right to a fair hearing on appeal to the Tribunal as envisaged under Section 14A (4) of the Act.

Damages

34. On the petitioner's claim for damages for the value of goods, for payment made to the Kenya Revenue Authority and estimated profits from the goods, I find that this is a claim that the petitioner should pursue before the Commercial and Tax Division of the High Court where it will be required to furnish specific proof of the loss.

35. I find that the jurisdiction of this court under Article 165(3) (b) of the Constitution is confined to determining whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

36. Having found that the petitioner's rights were violated, this court is under Article 23 of the Constitution empowered to grant appropriate relief including an order for compensation. The said compensation must be understood to be compensation for violation of the rights.

37. In this case, I am of the view that an award of kshs 2 million will be adequate compensation for the violation of the petitioner's rights.

38. Having regard to the findings I have made in this judgment, I find that the instant petition is merited and I therefore allow it in the following terms"

a) A declaration that the petitioner's right to own and control its own property as enshrined and contemplated in Article 40 of the Constitution, were violated by the negligent conduct of the respondent.

b) A declaration that the respondent compromised or violated the rights to fair administrative action and the legitimate expectation of the petitioner's under Article 47 of the Constitution.

c) A declaration that the respondents decisions to continually and indefinitely withhold clearance of the perishable good aforementioned in C above since 19th June 2018 without issuing immediate notices to the petitioners and/their agents on the reasons for withholding the consignment amounts to gross violation of the petitioner's right to efficient and fair administrative action.

d) That the respondent shall bear all costs related to Customs Warehouse Rent payable to Kenya Revenue Authority as well as Kenya Port Authority storage charges AND the demurrage charges payable to C.M.A C.M.G. Group Limited that have accrued since 19th June 2018 and which have accrued in relation to the 6,710 JERRYCANS OF 'SHAKIRA BRAND VEGETABLE OIL EACH PACKED IN 20 LITRES under K.R.A. license number 2018 E1806876929 and entry number 20181CD 26736.

e) I award the petitioner the sum of kshs 2 million for the violation of its constitutional rights.

f) An order that the respondent bears the costs and interests of these proceedings.

Dated, signed and delivered in open court at Nairobi this 30th day of April 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Wachira for petitioner

Mr Joba for Ombati for the respondent

Court Assistant - Ali