



**REPUBLIC OF KENYA**

**IN HIGH COURT OF KENYA AT KISII**

**MISC CIVIL APPLICATION NO. 3 OF 2018 JUDICIAL REVIEW**

***IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PROHIBITION AND CERTIORARI***

***IN THE MATTER OF: STANDARDS ACT- CAP 496 OF THE LAWS OF KENYA***

***IN THE MATTER OF: ILLEGAL SEIZURE AND INTENDED ILLEGAL DESTRUCTION OF THE EX PARTE APPLICANTS' SUGAR CONSIGNMENT***

**AND**

***IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, 2015***

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> INTERESTED PARTY**

**TRANSMARA SUGAR CO. LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**EXPARTE APPLICANTS:**

**1. SCOOPY ENTERPRISES**

**2. EEDI KENYA LIMITED**

**3. PATEL HARE KRISHNA BHANUBHAI**

**RULING**

1. By an order dated the 29/8/2018 the Applicant was granted leave to apply for orders of judicial review as sought in the chamber summons dated the 27/8/2018. Subsequently the Applicant filed the Notice of Motion dated the 17/9/2018. By a Ruling dated the 25/9/2018 this court noting that the application was not opposed held that the leave issued would operate as a stay of the intended destruction of the sugar consignment seized from the exparte applicants on the 18<sup>th</sup> and 19<sup>th</sup> June 2018. The sugar was to be stored at the premises pending inter partes hearing on the 17/10/2018. On the 17/10/2018, directions were given that the application be canvassed by way of written submissions. Parties highlighted their submissions in Court on the 29/4/2019.

2. The background of this matter in brief is that; on the 9/8/2018 police officers found the staff of the exparte applicants offloading sugar at the premises of Kisii Mattress Supermarket. The police officers arrested his driver and the exparte applicant's vehicle registration no KCF 906F so as to verify if the sugar was a counterfeit. The exparte applicant presented himself at the police station and presented all the documents he had in relation to the sugar, the invoices the delivery notes, ETR receipts. His driver and manager were accused of having in their possession counterfeit goods in the course of their trade. Thereafter the exparte Applicants lodged Kisii HC Misc. Civil Application No. 36 of 2018 challenging the actions taken by the police. The respondents were sued in the said matter. Kisii HC Constitutional Petition No. 9 of 2018 was also filed. The subject of all these suits is the sugar alleged to be counterfeit sugar. In a judgment dated the **2.8.2018** Justice Majanja made the following orders in Petition no. 9 of 2018;

*a) The Respondents (i.e the Director of Criminal Investigations Kisii County and the officer Commanding Kisii Police Station) shall release to the petitioner all the sugar seized from him and recorded in the inventory dated 18<sup>th</sup> June 2018.*

b) Upon release of the sugar the petitioner shall not sell or transfer the sugar unless a Kenya Bureau of Standards Officer has confirmed that the sugar meets the prescribed Kenyan Sugar standards.

c) The inspection and testing shall be done within the next fourteen (14) days from the date hereof failing which the sugar shall be unconditionally released to the petitioner.

d) These orders herein are without prejudice to the respondents or any another state agency taking action against the petitioner or the sugar in accordance with the law.

e) The petitioners costs shall also be borne by the respondents assessed at Kshs. 100,000/-.

f) Save for the order for costs, the judgment in Constitutional Petition No. 9 of 2018 shall apply to HC Kisii Judicial Review No.36 of 2018 (Republic vs. Director of Criminal Investigations, Kisii County and Officer Commanding Kisii Police Station, ex parte Scooby Enterprises Limited) and HC Kisii Judicial Review No.37 of 2018 (Republic vs. Director of Criminal Investigations, Kisii County and Officer Commanding Kisii Police Station, ex parte EECI Kenya Limited).

3. Subsequently the respondent issued a Seizure Notification on the 15<sup>th</sup> August 2018 which was retrieved from the police officers at Kisii Police station and at the foot it had the following remarks;

**“N/B seizure due to non-conformity detected from analysis results. Goods will continue to be under DCIO custody and will be destroyed in 14 days as from the date of the seizure notification.”**

4. The ex parte applicants submit that in issuing the seizure Notification the respondent although not a party in Petition no. 9 of 2018 acted in pursuant to limb (d) of the judgment the provisions of sections 14 and 14A of the Standard Act Cap 496 (“the Act”) of the Laws of Kenya. According to the Applicant the Seizure Notification is illegal, null and void and therefore incompetent for all intents and purposes for the following reasons that ;

i. Section 14A(1)(b) of the Act which places onus on the respondents inspector to demonstrate that it is reasonably necessary to destroy the ex parte applicants’ sugar consignments, either because they are in a dangerous state or because they are injurious to the health of human beings. The respondent has never taken any reasonable step to confirm that the sugar is unfit for human consumption.

ii. Whereas in its tests results the respondent found that the sugar did not meet the established standards, in issuing the notification, the respondent did not satisfy the condition that it was reasonably necessary to destroy the sugar.

iii. The destruction order issued by the respondent offends the mandatory provisions of section 14A (3) of the Act in that the respondents order warned of destruction within fourteen (14) days of “seizure” notwithstanding that section 14(A) (3) of the Act binds the respondent’s inspector to give “at least 14 days notice”. The notice period in the notification is shorter than the legally prescribed period.

iv. Sections 14 A (1) and 14A (3) of the Act read in conjunction do not envisage a situation where goods are seized and ordered to be destroyed in the same breach.

v. The respondent was bound to test and inspect the sugar within 14 days of the judgment delivered in Petition no.9 of 2018 as a condition precedent to further action.

5. The ex parte applicants claims that sections 14 (1) (a) and 14 A (1) (b) establishes conditions whose effect is to create statutory protection to the ex parte applicants. That they have been informed by the interested parties that the sugar can be re-processed to ensure that the mould and yeast found in the sugar is brought to acceptable levels to ensure that the same is fit for human consumption. That the high levels of mould and yeast found in the sugar could have been occasioned by the manner the sugar were preserved prior to testing which exposed the same to high moisture content. That to the extent that the sugar is capable of re-processing it is not reasonably necessary to order destruction of the same and the interested parties are ready to do it at their cost having manufactured the said sugar. That the actions of the respondents are unreasonable, unfair and done in abuse of power and with ulterior motive/malice. That the seizure notices could only be litigated after they issued on the 15<sup>th</sup> August 2018. They were also not the subject of Petition no. 9 of 2018 of Kisii HC Misc. Applications Nos. 36 of 37 of 2018 (Judicial Review). That the respondent is a quasi-judicial body whose powers are subject to supervision by the High Court.

6. The respondent filed a replying affidavit dated the 16<sup>th</sup> November 2018 sworn by Caroline Outa- Ogweno the acting director, Market Surveillance at the Kenya Bureau of Standards, in response to the ex parte applicant’s application. In her affidavit she states the role of Kenya Bureau of Standards (“KBS”) which is established under section 3 of the Standard Act. The functions of the KBS are provided under section 4 of the Act. That in accordance with its functions or mandate KBS in concert with its counterparts within the East African community has established standards known as the East African Standard which all healthy goods and products are required to meet. That for this sugar the subject of this matter they have developed the East African Standard Brown Sugar Specifications and every commodity imported, manufactured or processed for consumption in the Kenyan Market has to undergo testing for the purposes of ascertaining that the goods conform to the set standards. That the inspection of the goods to ascertain they conform to set standards is carried out by officers of KBS. The inspectors are empowered by section 14 of the Act. Section 14 (g) and (h) provides as follows, section 14 of the Act empowers inspectors to;

**14 (g) seize and detain , for the purpose of testing, any goods in respect of which he has reasonable cause to believe that an offence has been committed**

**14 (h) seize and detain any goods or documents which has reasonable cause to believe may be required as evidence in any proceedings for any offence under this Act.**

7. That on the 19<sup>th</sup> June 2018 the KBS received a request from the DCIO for sampling of suspected sugar and their agent Wilfred Bosire drew samples of the Ex parte applicants consignment for testing, which samples were tested against the East African Standard brown sugar specifications **EAS 739:2010** and it failed to comply with the set standards in relation to total viable count yeast and moulds. Through a letter dated the 2/8/2018 KBS notified the DCIO Kisii Central of its findings and on the 15/8/2018 a seizure notification was issued against the ex parte applicants for the reasons that their sugar was not in compliance with the said standard specification. The ex parte applicants refused to sign the on the seizure notice as required in law. That the Act only provides for destruction of substandard products and does not provide for reprocessing. That the ex parte applicants have not stated under which legal basis that they intend the sugar which was already been found to be substandard to be reprocessed. That it is the duty of KBS to ensure that substandard products are not traded in the market. That the orders sought by the ex parte applicants are administrative in nature and it has not been demonstrated which provision of the law the respondent breached in performing its mandate.

8. Parties filed written submissions. Parties highlighted the said submissions in court. Issues that arise from the submissions are;

**i. Whether this court has jurisdiction**

**ii. Whether the application has merits.**

According to the ex parte applicants this court has the jurisdiction to hear and determine the matter for the following reasons that; in the judgment delivered the court found that the petitioner's rights had been violated for the reason the legal framework for dealing with unwholesome goods which do not comply with prescribed standards had not been complied with. That the court directed that the sugar be tested with 14 days and if not the sugar be released unconditionally. That section 11 of the Act provides that any person who is aggrieved by the decision of Bureau or the Council *may* within 14 days of the notification of the Act complained of being received by him, appeal in writing to the Tribunal. That the said section is not couched on mandatory terms and that any person can appeal to the Tribunal. That the provision is merely directory as opposed to obligatory. That the legal consequence of not referring the matter to the respondent's Tribunal has not been specified in the Act. That this court has original jurisdiction and appellate jurisdiction under Article 165 of the Constitution of Kenya, 2010.

9. The Respondent submitted as follows on the issue of jurisdiction. That the ex parte applicant has not demonstrated that they have exhausted the appeal process at the Standard Tribunal set out in the Act, in particular sections 11, 14A ( 4), Section 16A (1) read together with 16C and 16G. That all acts complained of by the exparte applicants find their roots in the respondent's exercise of its mandate under the Act. That the Tribunal derives its powers on appeals from the decision of the respondent in section 16 ( c) of the Act which include powers to confirm, vary the decision or act of the respondent in question and may make such other orders that it considers appropriate from the Act. That the Act at section 16G provides for a right of appeal against the decision of the Tribunal lies to the High Court. For this argument the respondent relied on the decision of the court in **Meru Constitutional Reference No. 08 of 2016: Kenya National Chamber of Commerce and Industry & 2 others vs. Kenya Bureau of Standards & another** and also the decision in the case of **Kerugoya ELC Case No. 287 of 2014: Alice Mwera Ngai vs. Kenya Power & Lightning Company Ltd.**

**Determination**

10. In the case of Owners of Motor Vessel "Lillian s" vs. Caltex Oil Kenya Ltd [1989] KLR Justice Nyarangi held as follows, "**jurisdiction is everything and without it the court has no power to make one more step**". The exparte applicants, is challenging the acts of the respondent. The exparte applicants do not deny that the Act provides for a process to appeal against the decision of the respondent's officers. In this case the seizure notification is challenged. Section 11 of the Act provides that, "*Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal*". This Act has provided a remedy for a person who is aggrieved, and as was held by Justice Odunga in **Republic vs. Attorney General & another Ex-parte Philip Ndungu (Nairobi Misc. Civil Application no. 522 of 2016)** the court must exercise restraint itself and give an opportunity to the relevant bodies. In this case the Tribunal as established under sections 16 and 16 (c) to deal and with the dispute as provided in the statute. The word **may** does not give the applicant a right to file a matter in the High Court if it's aggrieved by a decision of KBS. Why then was the Tribunal established? The issues being raised in this matter are matters that fall within the jurisdiction of the Tribunal. To make a finding on the said issues would be denying the exparte applicants a chance to appeal to the High Court as provided in section 16G of the Act. The Court of Appeal in the case of **Speaker of National Assembly vs. James Njenga Karume, Civil Application No. Nai 92 OF 1992 (NAI 40/92 UR)** held as follows;

***"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions"***.

10. Under the Act the High Court is the appellant court and therefore the parties are expected to first comply with the provisions of the Act before moving to the High Court. The exparte applicants have failed to demonstrate what exceptional circumstances existed in their case which would remove it from the appeal process set out in the Act (**see Republic vs. National Environment Management Authority [2011] eKLR**). In my view this court has no jurisdiction to entertain the matter as the appeal process has not been exhausted by the exparte applicants. The exparte applicants ought to have appealed against the notice issued 14 days from the date of seizure notice. My view is that the matter has to go back to the Tribunal which has the mandate to deal with the issues being raised in the exparte applicants. I therefore decline to determine the merits of the application. This parties are referred back to the Tribunal, the body mandated to hear the complaints raised by the exparte applicants. The notice of motion dated the 17<sup>th</sup> September 2018 is therefore dismissed with costs.

**Dated signed and delivered at Kisii this 21<sup>st</sup> day of June 2019**

